Supreme Court, U.S.
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No. 95-160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GOLD COAST PUBLICATIONS, INC. and
NEW TIMES, INC.,
Petitioners,

v.

GEORGE M. CORRIGAN, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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July 27, 1995

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QUESTION PRESENTED

Whether, under *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995)—issued after the decision below—a municipality may require strict and homogenized uniformity of appearance among all newsracks appearing on public sidewalks, despite the "overall irrationality of [a] . . . regulatory scheme," *id.* at 1592, that permits many other objects on public streets and sidewalks to violate the municipality's purported interest in projecting a "Mediterranean theme."

PARTIES

Petitioner Gold Coast Publications, Inc. is a wholly-owned subsidiary of the Sun-Sentinel Company, Inc., which in turn is a wholly-owned subsidiary of the Tribune Company, Inc., a publicly traded corporation. Petitioner New Times, Inc., an Arizona corporation, does business in Florida as New Times Newspapers of Florida, Inc. and owns a controlling interest in two limited liability companies: NTI Events, L.L.C., and NTI Communications, L.L.C. Respondents are George M. Corrigan, the Mayor of the City of Coral Gables; James Barker, the Vice Mayor; William H. Kerdyk, a City Commissioner; Bob Hildreth, a City Commissioner; Wayne "Chip" Withers, a City Commissioner; Alan L. Richman, the Code Enforcement Officer; the City of Coral Gables, a municipal corporation and political subdivision of the State of Florida; and the Coral Gables City Commissioner, the governing body of the City of Coral Gables.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gold Coast Publications, Inc. and New Times, Inc. respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, vacate the decision below, and remand the case for further proceedings in light of *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

OPINIONS BELOW

The opinion of the court of appeals is reported at 42 F.3d 1336 (11th Cir. 1994), and is included in the Appendix ("App.") at 1a-26a. The opinion of the district court is reported at 798 F. Supp. 1558 (S.D. Fla. 1992), and is included in the Appendix at 27a-54a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on December 30, 1994. Rehearing was denied on March 29, 1995. App. 76a-77a. A timely application for extension of time was filed on June 2, 1995. On June 6, 1995, Justice Kennedy issued an order extending the time for filing this petition up to and including July 27, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

ORDINANCE INVOLVED

The Code of the City of Coral Gables, Fla., § 22-164 provides, in pertinent part, that:

> (a) . . . .
>
> (b) Newsracks shall have gloss brown pedestals, gloss beige sides and door and gloss brown coin box. . . . The height of the cabinet top of all newsracks shall be thirty-nine (39) inches above the finished grade level.
>
> (c) Newsracks shall carry no card holders or advertising except the name of the newspaper being dispensed centered fifteen (15) inches from the top of the cabinet, with duplicate lettering on the front and back of the cabinet, such lettering not exceeding one and three-quarters (1-3/4) inches in height. . . .

Id.

STATEMENT

1. Petitioners are two publishers of "alternative" newspapers in South Florida. Petitioner Gold Coast publishes *Exito*, a Spanish-language newspaper directed at young, educated Hispanic professionals in south Florida. Petitioner New Times publishes the only general circulation English-language alternative to the *Miami Herald* in the Miami metropolitan area, and often reports on the *Herald* itself.

Like many alternative newspapers, *Exito* and *New Times* are distributed only through newsracks, and not

through subscriptions or home delivery.[1] Because neither is as well-known as mainstream newspapers, petitioners have sought to attract the attention of potential readers by circulating their papers in distinctive newsracks. Thus, Gold Coast distributed the first issues of *Exito* in purple and green newsracks that displayed the large *Exito* logo in lime green, bright orange, or hot pink. Such colors, the district court found, "cause [a] publication to stand out from the rest," App. 29a, and, indeed, are necessary to keep newspapers like *Exito* and *News Times* from becoming "invisible." *Id.* at 51a.

On November 26, 1991, the City of Coral Gables ("City" or "Coral Gables") informed Gold Coast that its newsracks violated a provision of the city code that imposes strict stylistic restrictions on any newsrack appearing in public rights of way. In particular, Coral Gables requires all newsracks to have "gloss brown pedestals, gloss beige sides and door and gloss brown coin box" and, in a similar vein, forbids any newsrack to display the name of its sponsoring newspaper with lettering larger than 1¾″ in height. See Code of the City of Coral Gables, Fla., § 22-164(b)-(c) ("newsrack ordinance"). The City adopted these regulations to advance its purported interest in projecting a subdued, "Mediterranean" theme in the physical appearance of its public rights of way. App. 19a.

Because Gold Coast believed that these sylistic restrictions violated its First Amendment rights, it refused to comply with them. In response, the City confiscated a number of the nonconforming *Exito* newsracks. On April 10, 1992, Gold Coast filed this lawsuit, seeking, *inter alia*, injunctive relief against application of the ordinance. New Times, which had filed a similar lawsuit in state court, intervened.

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[1] According to one estimate, "almost half of the single copy sales of newspapers are now distributed through newsracks." *City of Cincinnati* v. *Discovery Network, Inc.*, 113 S. Ct. 1505, 1509 n.10 (1993).

2. The district court granted a preliminary injunction in favor of petitioners. Consistent with other courts that have addressed the issue, the court observed that the First Amendment protects a publisher's right to distribute newspapers through newsracks in public rights of way. *Id.* at 42a-43a & n.12. The court also found that "[u]niform color," as required under the City's ordinance, "essentially renders newsracks invisible, which is especially detrimental to new market entries such as *Exito*[.]" *Id.* at 50a-51a. Employing the traditional time, place, and manner test for government restrictions on speech in public fora, see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), the court struck down the relevant portion of the City's newsrack ordinance as an impermissible violation of petitioners' First Amendment rights.

Although the district court found that the City had legitimate interests in suppressing "visual blight" and advancing certain aesthetic ideals, App. 48a, it found that the ordinance was not "narrowly tailored to serve those goals." *Id.* at 50a. First, the court held that a municipality's interest in banning "visual blight" does not authorize it to straitjacket First Amendment speakers with regulations requiring utter uniformity of appearance. "Merely referring to a group of newsracks of different colors as 'visual blight' does not justify the color and size of lettering restrictions. . . . The photographs admitted here show a multitude of colors, but the newsracks are not in a poor state of repair." *Id.*

The district court also rejected the City's argument that its ordinance was necessary to promote a specific aesthetic image. That reasoning, the court found, was irreconcilable with the City's decision to permit other objects on its streets and sidewalks to clash with its prescribed color code: "[R]egulations mandating uniformity of newsrack color and size of lettering are especially offensive to First Amendment concerns, when the city au-

thorizes a variety of colors and lettering size on other street furniture and architectural projections." *Id.* In particular,

> the photographs show awnings over buildings in Coral Gables representing a large spectrum of colors. Trash barrels, owned by the city, are multi-colored and the lettering on the sides of these receptacles is not limited to 1¾". The University of Miami may identify its buildings with four-inch lettering on signs while newsracks are limited to 1¾" lettering. The banner of aesthetics, here, can quite possibly be a public rationalization for the impermissible purpose of targeting newsracks. *The city simply has not shown how requiring newsracks to be gloss brown or beige and limiting the size of lettering on the sides of newsracks advances its interest in aesthetics.*

Id. (emphasis added). The district court concluded that "[w]here a newspaper relies largely on its unique coloring and logo scheme to improve its circulation, and the public right of access to newspapers depends on its familiarity with that scheme, restrictions mandating homogeneity of color are not merely incidental, but rather disproportionate restraints on freedom of expression." *Id.* at 51a; see also *supra* at 3.

3. The court of appeals reversed. The court did not dispute the district court's finding that requiring uniformity among newsracks rendered alternative newspapers like *Exito* and *New Times* "invisible" to potential readers. See App. 51a. Nor did it dispute that the City consistently permits other objects on its streets and sidewalks to violate its putative aesthetic standards. Instead, the court of appeals reversed on the ground that the district court had demanded too close a fit between the City's stated aesthetic interests and the means it had chosen to advance them.

The court of appeals addressed this issue twice, with almost identical analysis: once under the traditional time, place, and manner test, and again under the commercial speech analysis set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). See App. 16a-19a, 20a-21a. Although each of the court's two treatments of this issue is erroneous,[2] this petition specifically challenges the court's commercial speech analysis, which is squarely at odds with this Court's subsequent decision in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

The third *Central Hudson* factor asks whether a government restriction on commercial speech advances a substantial government interest " 'in a direct and material way.' " *Id.* at 1592 (quoting *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993)).[3] In applying this factor, the court of appeals held that the newsrack ordinance advances the City's purported interest in "minimizing visual blight and ensuring that newsracks blend into the City's Mediterranean theme." App. 20a. Although the court recognized that the City itself has severely compromised that "interest" by permitting many other objects in public rights of way to clash with its "Mediterranean theme," the Court did not regard this issue as relevant to the third prong of *Central Hudson*. When it did address the issue under the fourth prong, it simply concluded, without analysis, that the First Amendment's protection of commercial speech permits "partial solution[s] to aesthetic concerns." *Id.* at 21a. Because it perceived no limits on that principle—a view that this Court rejected several months later in *Coors*—the court of appeals upheld the newsrack ordinance.

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[2] As the court of appeals recognized, the ordinance is unconstitutional if it violates either the time, place, and manner test or the *Central Hudson* analysis for commercial speech. App. 12a.

[3] In applying the first two factors of *Central Hudson*, the court found (1) that petitioners' conduct qualified for First Amendment scrutiny because it involved "lawful activity . . . and is not misleading," and (2) that "the aesthetic concerns advanced by the City are a substantial governmental interest." App. 20a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that, in pursuit of a vague and inconsistently applied "aesthetic" image, a municipality may forbid a publisher to present its newspaper in a form that appeals to, and is easily recognized by, its distinctive readership. The implications of that decision are disquieting, particularly to publishers of "alternative" newspapers like *Exito* and *New Times*, which seek to establish readerships for their unique content in an intensely competitive market. Yet, petitioners do not ask this Court to grant plenary review now of the decision below. Instead, because that decision is irreconcilable with this Court's intervening decision in *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995), this Court should grant the petition for certiorari, vacate the decision below, and remand the case to the court of appeals for further proceedings in light of *Coors*.

1. In *Coors*, this Court invalidated § 5(e)(2) of the Federal Alcohol Administration Act of 1935, which prohibited beer labels from displaying alcohol content, as inconsistent with the First Amendment's protection of commercial speech. After determining that the speech in question was truthful and nonmisleading, *id.* at 1590, and that the government "has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength," *id.* at 1591, the Court turned to the third and fourth *Central Hudson* factors. Those two factors require, respectively, "that a valid restriction on commercial speech directly advance the governmental interest and be no more extensive than necessary to serve that interest." *Id.* As the Court observed, these "last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means

chosen to accomplish those ends." *Id.* (internal quotations omitted).[4]

In applying the third *Central Hudson* factor, the Court made clear, arguably for the first time, that "the overall irrationality of . . . [a] regulatory scheme" can foreclose a finding that the scheme "directly advances" a legitimate governmental interest. *Id.* at 1592. In particular, the Court held that the government may not invoke a given interest to justify restrictions on commercial speech if its regulatory scheme as a whole routinely permits activities that are inconsistent with that interest. *Id.* In *Coors* itself, the regulatory scheme that barred the display of alcohol content on beer labels nonetheless permitted disclosure of alcohol content (1) in beer advertisements in most states, (2) of "wines and spirits," and (3) through designation and promotion of a beverage as a high-alcohol "malt liquor." *Id.* at 1592-93. This defect alone invalidated the statute, for "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve" the asserted regulatory end. *Id.* at 1593.[5]

2. The reasoning below is irreconcilable with the reasoning of *Coors*. Like the district court before it, the court of appeals recognized that Coral Gables' pursuit

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[4] In *Florida Bar* v. *Went For It, Inc.*, 63 U.S.L.W. 4644 (U.S. June 21, 1995), this Court characterized the second, third, and fourth factors of the *Central Hudson* test as, respectively, the first, second, and third factors. To maintain consistency with the decisions below, we have retained the four-factor approach. Although the *Florida Bar* decision upheld a restriction on lawyer solicitation, the Court's analysis specifically reiterates the approach the Court took in *Coors*; accordingly, a remand will also permit the Eleventh Circuit to evaluate the ordinance here in light of the teaching of *Florida Bar* as well.

[5] The Court also found, under *Central Hudson*'s fourth factor, that the restriction on beer labels was "more extensive than necessary" to advance the government's purported interest. *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995).

of aesthetic uniformity was riddled with inconsistencies—that while the City required newsracks to appear in beige and brown, it permitted trash receptacles, awnings, and other objects on public streets and sidewalks to clash with its supposed "Mediterranean theme." App. 20a. Yet the court did not even view this issue as relevant to *Central Hudson*'s third factor. *Id.* When it addressed the issue in its analysis of *Central Hudson*'s fourth prong, the court held simply that nothing in the First Amendment forbids a municipality to enact "a partial solution to aesthetic concerns." *Id.* at 21a. But such obviously "partial" solutions are precisely what *Coors* condemned.

The court of appeals purported to derive its reasoning, in part, from the plurality opinion in *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981). App. 21a. The *Metromedia* plurality held that application of the *Central Hudson* analysis did not invalidate a municipal ordinance that, in pursuit of aesthetic interests, banned "offsite" advertising on city streets but nonetheless permitted "onsite" advertising. The plurality found that the city's explanation for this distinction was "reasonabl[e]." 453 U.S. at 512. Stretching this reasoning into a categorical rule, the court of appeals held, in effect, that a municipality may invoke aesthetic concerns to suppress specific forms of commercial speech no matter how inconsistently it protects those concerns in other areas: *i.e.*, no matter how "partial" its solution to aesthetic concerns" may be. App. 21a.

Whether or not the court of appeals' reasoning otherwise could be considered an acceptable application of the plurality opinion in *Metromedia*, it cannot be squared with this Court's subsequent decision in *Coors*. In *Coors*, this Court invalidated the alcohol labeling ban precisely because it *was* a partial and internally inconsistent solution to the problem of "strength wars." See *Coors*, 115 S. Ct. at 1592-93. More generally, the *Coors* decision holds that any kind of regulatory solution can be so

partial that, under *Central Hudson*'s third prong, it cannot be said to "advance[] the Government's interest 'in a direct and material way.'" *Id.* at 1592 (quoting *Edenfield* v. *Fane*, 113 S. Ct. 1792, 1798 (1993)). Coral Gables's newsrack ordinance, which serves an aesthetic goal that the City elsewhere ignores, is precisely such a regulation. For that reason, *Coors*, if it had been handed down before the decision below, plainly would have been the focus of advocacy and judicial consideration. Accordingly, petitioners should have an opportunity to present this analysis in the court of appeals, and the court of appeals should have the opportunity to reconsider the validity of its previous decision in light of this Court's recent First Amendment precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the decision below should be vacated, and the case should be remanded to the Eleventh Circuit for further proceedings in light of *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 92-4764

GOLD COAST PUBLICATIONS, INCORPORATED,
a Delaware corporation d/b/a Exito,
Plaintiff-Appellee-
Cross-Appellant,

NEW TIMES NEWSPAPER OF FLORIDA,
Intervenor-Plaintiff,

GEORGE M. CORRIGAN, individually as the Mayor of the City of Coral Gables, JAMES BARKER, individually as Vice Mayor of the City of Coral Gables, WILLIAM H. KERDYK, individually as City Commissioner of the City of Coral Gables, BOB HILDRETH, individually as City Commissioner of the City of Coral Gables, WAYNE "CHIP" WITHERS, individually as City Commissioner of the City of Coral Gables, CITY OF CORAL GABLES, a municipal corporation and political subdivision of the State of Florida, ALAN L. RICHMAN, as Code Enforcement Officer of the City of Coral Gables, CORAL GABLES CITY COMMISSION, the governing body of the City of Coral Gables,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

Dec. 30, 1994

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and RONEY, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This case involves a challenge to the constitutionality of a municipal ordinance regulating the placement of newsracks on public rights-of-way in the City of Coral Gables, Florida ("the City"). A newspaper publisher contends that the Ordinance is a facially invalid abridgment of the newspaper's rights of free speech and free press under the First Amendment of the United States Constitution and comparable provisions of the Florida Constitution, as well as a due process and equal protection violation under both the Federal and Florida Constitutions. The City asserts that the Ordinance represents valid place or manner restrictions that further the City's aesthetic and safety interests.

In ruling on Gold Coast's motion for a preliminary injunction, the district court concluded that the Ordinance was facially valid except for three provisions that require the use of a particular make and model of newsrack or its "equivalent," require a uniform color for all newsracks, and specify the size of lettering on the newsracks. The district court enjoined the enforcement of these three provisions, but allowed the enforcement of the other regulations in the Ordinance. Whether viewed as potential prior restraints, limitations on commercial speech, or restrictions on noncommercial speech, the disputed provisions of the Ordinance do not violate the First Amendment. Thus, we conclude that the district court erred in enjoining the enforcement of portions of the Ordinance. Accordingly, we reverse the district court's grant of injunctive relief regarding the provisions on equivalent newsracks, uniform color, and size of lettering, and we affirm the district court's denial of injunctive relief regarding the remaining provisions of the Ordinance.

I.

A.

Following its adopted motto, "the City Beautiful," the City of Coral Gables has emphasized aesthetics in planning development and promoting the City. During the 1980s, a task force [1] studied methods of improving the appearance of the City's business district. As one aspect of its work, the task force reviewed alternatives for regulating the proliferation of newsracks in the downtown area. After studying the condition of newsracks in the City, as well as other cities' restrictions on newsracks, the task force developed a proposed Ordinance to regulate newsracks and revised its proposal several times based on input from newspaper publishers and public hearings. Following review by the Planning and Zoning Department, the Public Works Department, the Chamber of Commerce, the City Attorney, and the City Manager, the draft Ordinance was adopted by the City Commission in 1987. A subsequent version of the Newsrack Ordinance is at issue in this case, Ordinance 2911, adopted on May 15, 1990, as amended by Ordinance 2984, adopted on March 31, 1992. Coral Gables, Fla., Code ch. 22, art. VII (1992) [hereinafter collectively "the Newsrack Ordinance" or "the Ordinance"].

The various provisions of the Newsrack Ordinance prescribe the procedure for obtaining permits to place newsracks on public rights-of-way throughout the City as well as specific regulations regarding the location, design, lettering, and color of newsracks. Some of the purposes of the Ordinance, as set forth in Section 22-157,[2] are to: (1) "[p]rovide for pedestrian and driving safety and con-

[1] This group, named the "Miracle Mile/Ponce Task Force" after two intersecting streets in the business district that were the focus of the beautification effort, consisted of Chamber of Commerce members, merchants, property owners, and citizens.

[2] We will refer to the section numbers of Ordinance 2984, the Ordinance as amended, and explain any changes from Ordinance 2911 as necessary.

venience"; (2) "[r]estrict unreasonable interference with the flow of pedestrian or vehicular traffic"; (3) "[p]rovide for public and property safety during hurricane conditions"; (4) "[p]rovide reasonable access for the use and maintenance of poles, posts, traffic signs or signals, hydrants, [and] mailboxes"; (5) "[r]elocate and or replace newsracks which result in a visual blight"; and (6) "[m]aintain and protect the values of surrounding properties."

Section 22-159 describes the application procedure for obtaining certificates of compliance, including the City officials responsible for approval and compliance with specific provisions, and the required supporting documents, such as a map showing the location of all newsracks belonging to a particular publisher or distributor. Section 22-160 requires that a publisher obtain a certificate of insurance and pay a one-time refundable bond deposit, which is calculated based on the number of newsracks displayed. Section 22-161 sets forth fees, including a one-time fifty dollar per publisher certificate of compliance fee, a ten dollar per newsrack certification fee, and a five dollar reinspection fee for all failed inspections, which are all calculated to defray administrative costs with any excess revenues returned to publishers. Section 22-162, covering appeals from certification denials, provides for a hearing by the City Commission within thirty days of filing "or at the next regularly scheduled agenda, whichever is sooner," and for judicial review under Florida law.

Section 22-163, governing the general placement of newsracks, specifies that the newsracks must be placed parallel to the curb between eighteen and twenty-four inches from the edge of the curb or parallel to a building not more than six inches from the building's wall. In addition, Section 22-166 sets forth specific prohibitions on placing newsracks within certain distances of crosswalks, bus stops, benches, fire hydrants, emergency call

boxes, driveways, display windows, street signs, parking meters, street lamps, or utility poles.

Section 22-164(a) requires publishers to use a particular make and certain models of newsracks (Shorack TK-80PM or K-80PM), or if demand warrants, a newsrack that holds more newspapers (Shorack TK-80 or K-80) "or equivalent." Although Ordinance 2911 did not define equivalent, Section 22-156(c) states that " '[e]quivalent' newsrack means any newsrack which is of the same size, dimensions and style of the specified newsrack." Similarly, Ordinance 2911 did not mention modification of newsracks to hold tabloid-style [3] newspapers, but Section 22-164(a) stipulates that "[m]anufactured modifications to the door, window, and cabinetry for the above-described newsracks to accommodate vertically-formatted, 'tabloid-type' newspaper display and distribution are acceptable." Regarding the color of the newsracks, Section 22-164(b) mandates that "[n]ewsracks shall have gloss brown pedestals, gloss beige sides and door and gloss brown coin box." Section 22-164(c) prohibits card holders or advertisements on newsracks, but allows the name of the newspaper to be displayed on the sides, front, and back of the newsrack provided that the lettering is no larger than 1¾ inches in height and centered at fifteen inches from the top of the cabinet. Whereas Ordinance 2911 did not adjust these specifications for tabloid-style newspapers, Section 22-164(c) indicates that "[t]he above fifteen inch (15″) dimension may be adjusted on the door by the manufacturer to accommodate modifications for vertically-formatted, 'tabloid-style' newsracks."

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[3] The two main formats for newspapers are tabloid-style, such as the *New York Post*, *Village Voice*, or *National Enquirer*, and broadsheet, such as the *Wall Street Journal*, *New York Times*, or *Washington Post*.

B.

In November 1991, appellee Gold Coast Publications, Inc. ("Gold Coast") began publishing *Exito*,[4] a tabloid-style, weekly Spanish-language newspaper directed at young, educated Hispanic professionals. *Exito* is distributed free of charge in the City of Coral Gables, and throughout Dade County, solely by means of newsracks; home delivery is not available. To attract readers to its new and relatively unknown publication, the newsracks carrying *Exito* were painted deep purple and prominently displayed the unique *Exito* logo in lime green, bright orange, or hot pink.[5] In addition, the newsracks were specifically designed to hold tabloid-style newspapers. By February 1992, *Exito*'s circulation had reached approximately 75,000, compared to 50,000 for its first issue.

On November 26, 1991, Alan L. Richman, Code Enforcement Officer for the City, notified *Exito*'s distributor by certified letter that newsracks displaying *Exito* did not comply with the Code, that the newsracks must be brought into compliance, and that if the newsracks were not in compliance upon reinspection thirty days later, the City would confiscate them. After receiving this notice, Gold Coast obtained a fifteen-day extension of the deadline for compliance; Gold Coast was unsuccessful, however, in obtaining an exemption from the uniform size, color, and design requirements that was granted to another publisher, New Times, Inc., based on an injunction entered in a separate state court action challenging the Newsrack Ordinance. On January 17,

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[4] Exito means "success" or "hit" in Spanish.

[5] Gold Coast applied for trademark registration for the *Exito* trade name, logo, and trade dress under state and federal trademark statutes; state trademark registration was granted in March 1992, and federal registration was pending when Gold Coast brought this suit.

1992, the City confiscated six of *Exito*'s newsracks [6] and subsequently informed *Exito*'s distributor that the newsracks would be released upon payment of fifty dollars per newsrack.

I.

On April 10, 1992, Gold Coast brought this action against the City.[7] Before the City's response to Gold Coast's complaint was due, Gold Coast, having obtained leave of court, filed an amended complaint on May 26, 1992; meanwhile, New Times, Inc. ("New Times") the publisher of another tabloid-style, weekly newspaper, *New Times*, distributed through newsracks in the City of Coral Gables, intervened as a party-plaintiff.[8]

Gold Coast's amended complaint is framed in eleven substantive counts. Counts I and VII of the amended complaint allege that the Ordinance violates the newspaper's right to freedom of the press under the First Amendment and Article I, Section 4 of the Florida Constitution because (1) the permit requirement of Section 22-158 and the designated newsrack required by Section 22-164(a), which cannot accommodate tabloid-style news-

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[6] Gold Coast alleges in its amended complaint that eight newsracks were confiscated, including one from private property. However, the district court found that six newsracks were seized, all from public rights-of-way. *Gold Coast Publications, Inc. v. Corrigan*, 798 F.Supp. 1558, 1562 (S.D.Fla.1992).

[7] In addition to the City, Gold Coast named as parties-defendant, in their individual and official capacities, the following City officials: George M. Corrigan, Mayor of Coral Gables; James Barker, Vice Mayor; William H. Kerdyk, Bob Hildreth, and Wayne "Chip" Withers, City Commissioners; the Coral Gables City Commission, consisting of the Mayor, Vice Mayor, and City Commissioners; the City of Coral Gables; and Alan L. Richman, the Code Enforcement Officer. They have been dismissed from the case and, accordingly, are not before us.

[8] The court permitted New Times to intervene because it was prosecuting a state court action challenging the constitutionality of the Ordinance.

papers, constitute impermissible prior restraints; (2) Section 22-159(b) gives the Public Works Director unbridled discretion to determine whether newsracks are equivalent under Section 22-156(c); (3) the location restrictions in Sections 22-166 and 22-163 are overbroad and not rationally related to health, safety, and welfare; (4) the fee schedule in Section 22-161 creates an impermissible tax; and (5) the application and installation procedures of Sections 22-159 and 22-165 create an impermissible burden on the exercise of free press rights. Counts V and X allege that Section 22-159(c)(3), requiring submission of a map showing the location of all *Exito*'s newsracks, violates the right to free speech under the First Amendment and Article I, Section 4 of the Florida Constitution by forcing disclosure of trade secrets. Counts III and IX allege a violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 2 of the Florida Constitution because the Ordinance and the City discriminate against newspapers generally by exempting charitable and religious organizations from licensing provisions and by not subjecting other vending machines or fixtures, such as trash receptacles, to the uniform color and lettering requirements; against tabloid-style newspapers by specifying newsracks that can only hold broadsheet newspapers; and against *Exito* in particular by refusing to grant the exemption given to *New Times*. Counts IV and XI allege violations of the Due Process Clause of the Fourteenth Amendment and Article I, Section 9 of the Florida Constitution because, among other things, the City's notice advising Gold Coast of its Ordinance violations lacked specificity. Count VI alleges violation of Gold Coast's civil rights pursuant to 42 U.S.C. § 1983 (1988) based on the constitutional violations described in the other counts. Counts II and VIII allege that Section 22-164(a)-(c), specifying uniform design, color, and size of lettering, violates the trademark protections of the Lanham Act, 15 U.S.C. §§ 1051-1127 (1988), and Chapter 495, Florida Stat-

utes (1992) by prohibiting the use of the *Exito* logo and trade dress. With respect to each count, Gold Coast seeks a declaration that the Ordinance is invalid and an order enjoining the enforcement of its provisions.

2.

The day after it filed its amended complaint, Gold Coast applied for a preliminary injunction restraining the City from enforcing the Ordinance. Thereafter, the district court held a four-day evidentiary hearing on Gold Coast's application. On July 9, 1992, the district court, applying the standard for assessing facial constitutional challenges set forth in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-59, 108 S.Ct. 2138, 2143-45, 100 L.Ed.2d 771 (1988), granted Gold Coast partial relief on Counts I and VII of the amended complaint by enjoining: (1) the use of the term "equivalent" in Section 22-164(a) of the Ordinance, which constituted an impermissible prior restraint of First Amendment protected speech because it allowed officials to exercise standardless discretion in determining which newsracks were equivalent; and (2) the requirement of uniform color and the limitation on the size of lettering, which did not meet the standards for time, place, or manner restrictions enunciated in *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954-55, 74 L.Ed.2d 794 (1983). *Gold Coast Publications, Inc. v. Corrigan*, 798 F.Supp. 1558, 1563-64, 1572-73 (S.D. Fla. 1992). The court upheld the regulations regarding mounting, installation, and placement of newsracks as permissible place and manner restrictions and declared the licensing fees and insurance requirements constitutional. *Id.* at 1573. The district court then severed the invalid portions from the Ordinance and enjoined the City from enforcing those provisions. *Id.* at 1572-73. The City appeals the grant of injunctive relief; Gold Coast cross-appeals the court's refusal to enjoin the insurance provision of the Ordinance.

II.

A.

We review the district court's partial grant and partial denial of injunctive relief under an abuse of discretion standard. *Tally-Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1022 (11th Cir.1989). We accept the district court's findings of fact unless they are clearly erroneous and review questions of law *de novo*. *Id.*

To satisfy the requirements for a preliminary injunction, the movant must establish: (1) a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and (4) an injunction woud not harm the public interest. *Id.* The district court noted that "the issuance of a preliminary injunction in the context of free speech turns solely on whether the challenged ordinance violates the First Amendment." *Gold Coast*, 798 F.Supp. at 1563. Because we conclude that the provisions of the Ordinance that the district court enjoined do not violate the First Amendment, Gold Coast fails to meet its burden of persuasion regarding the likelihood of success on the merits and, therefore, is not entitled to injunctive relief. *See Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 627 (11th Cir.1992).

B.

Before turning to the merits of the First Amendment claim, we must first determine whether Gold Coast may properly bring a facial challenge to the Ordinance. In *Lakewood*, the Supreme Court held that

> a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked

> speakers . . . [where] [t]he law [has] a close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks.

486 U.S. at 759, 108 S.Ct. at 2145. Although the Coral Gables Ordinance does not include the annual licensing renewal found in *Lakewood, see id.*, the requirement of a certificate of compliance before installing any new newsracks or moving an old newsrack and the periodic inspections of existing newsracks, when coupled with the "equivalent" language of Section 22-164(a), could arguably provide the opportunity to discriminate based on the content of speech contained in the newspapers. Similarly, the Coral Gables Ordinance is directed at the very same expression at issue in *Lakewood*—the distribution of newspapers through newsracks on public rights-of-way. *See id.* at 753-54, 108 S.Ct. at 2142. Consequently, Gold Coast may facially attack the constitutionality of the Ordinance.

III.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I. It is well settled that the right to distribute newspapers through newsracks is protected under the First Amendment. *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673-74 (11th Cir.1984); *see also Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1196 (11th Cir.1991) (citing *Miami Herald*). Nevertheless, a newspaper publisher does not have complete freedom in setting up a newsrack distribution scheme. A municipality may regulate the placement of newsracks on streets and sidewalks provided that such regulations are valid time, place, or manner restrictions. *Gannett Satellite Info. Network, Inc. v. Township of Pennsauken*, 709 F.Supp. 530, 536 (D.N.J.1989).

A.

The validity of restrictions on protected First Amendment expression depends upon the type of speech and the type of forum being regulated. Because there is no precedent classifying the color and size of lettering on newsracks as a particular type of speech, we initially analyze those provisions as restrictions on pure, noncommercial speech and subsequently as restrictions on commercial speech. The precise classification is irrelevant to the outcome of this case, however, because the challenged provisions are upheld under either commercial or noncommercial speech standards. The type of forum—a traditional public forum—remains constant throughout our analysis.

Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. at 954. Streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939). In this case, the newsracks that Coral Gables seeks to regulate are located in a traditional public forum—on public rights-of-way.

Coral Gables' ability to limit expression in traditional public fora is "sharply circumscribed." *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. at 955. A limitation on the content of expression must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Id.* A content-neutral limitation on the time, place, or manner of expression must: (1) be "narrowly tailored to serve a significant government interest"; *and* (2) provide "ample alternative channels of communication." *Id.*

1.

We first determine whether the Ordinance is a content-based or content-neutral regulation. The Supreme Court recently reviewed the constitutionality of a municipal ordinance that prohibited newsracks containing "commercial handbills" but permitted newsracks containing newspapers.[9] *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, ——, 113 S.Ct. 1505, 1508, 123 L.Ed.2d 99 (1993). Because the ordinance differentiated between acceptable newsracks and unacceptable newsracks based on the content of the material inside the newsrack, the Court concluded that the regulation was not content neutral. *Id.* at ——, 113 S.Ct. at 1516-17. Coral Gables requires the owners of *all* newsracks to comply with the various provisions of the ordinance; there is no distinction made between publications based on their content.[10] For

[9] The ordinance defined "commercial handbills" to include written or printed material that advertised products, services, businesses, meetings, events, or performances for the purpose of promoting sales or profits. *City of Cincinnati v. Discovery Network, Inc.*, —— U.S. ——, —— n. 2, 113 S.Ct. 1505, 1508 n. 2, 123 L.Ed.2d 99 (1993).

[10] At oral argument, Gold Coast asserted that the Ordinance was not content neutral because it discriminated against tabloid newspapers by specifying newsracks that could not accommodate tabloid newspapers. This claim implicates two overlapping doctrines—content neutrality under the First Amendment and equal protection. *See Burson v. Freeman*, —— U.S. ——, ——, n. 3, 112 S.Ct. 1846, 1850 n. 3, 119 L.Ed.2d 5 (1992). Although Gold Coast alleges in Counts III and IX of its amended complaint that this discrimination amounted to an equal protection violation, it has not cross-appealed the court's refusal to grant injunctive relief on these counts. Accordingly, we do not address the equal protection allegation.

As to the claim that the disparate impact makes the Ordinance content based, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys. The government's purpose is the controlling consideration." *Ward*

example, the uniform color and size of lettering restrictions affect all newspapers equally: An individual desiring to purchase a copy of the *Miami Herald* can no more easily distinguish a *Miami Herald* newsrack than can an individual wishing to pick up a copy of *Exito*, each must be close enough to view either the lettering on the sides of the newsrack or the front page of the newspaper through the front window.[11] Consequently, the Ordinance is a content-neutral regulation and must be judged against the two requirements for the time, place, or manner restrictions.

2.

Turning to the first prong of the time, place, or manner test, the City has steadfastly contended that safety and aesthetic interests are the bases for the Newsrack Ordinance. The Supreme Court has recognized aesthetics and safety as significant government interests legitimately furthered through ordinances regulating First Amendment expression in various contexts. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-07, 104 S.Ct. 2118, 2129-30, 80 L.Ed.2d 772 (1984) (holding that Los Angeles' valid aesthetic interests supported a prohibition on posting signs, includ-

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v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) (emphasis added) (citation omitted). Gold Coast has produced no evidence that the City enacted the Ordinance because of a dislike of the messages conveyed by tabloid-style newspayers. In fact, Section 22-157 states that one of the purposes of the Ordinance is to "[t]reat all newspapers equally regardless of their size, content, circulation, or frequency of publication." Consequently, this argument fails.

[11] At oral argument, Gold Coast alleged that the color and lettering provisions disproportionately affected *Exito* because the newspaper was first introduced after the Ordinance was in effect and, therefore, could not attract new readers with its brightly colored newsracks. Whether the Ordinance has a disparate impact on *Exito*, however, is an issue appropriate for an "as applied" challenge rather than a facial challenge.

ing political signs, on public property); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-10, 101 S.Ct. 2882, 2893-94, 69 L.Ed.2d 800 (1981) (plurality opinion) (recognizing aesthetics and safety as valid interests in reviewing a prohibition on off-site commercial billboards and all noncommercial billboards); *see also Discovery Network*, —— U.S. at ——, 113 S.Ct. at 1517 (striking down, as content based, a prohibition on newsracks containing commercial handbills despite the recognition of safety and aesthetics as valid governmental interests). In most cases, the outcome turns not on whether the specified interests are significant, but rather on whether the regulation is narrowly tailored to serve those interests.

In examining the relationship between the City's interests and the effect on Gold Coast's First Amendment rights, the district court stated that the restriction must be "no greater than necessary" or no "broader than necessary" to accomplish the City's goals. *Gold Coast*, 798 F.Supp. at 1571. The Supreme Court, however, has expressly rejected the "less-restrictive-alternative analysis" for time, place, or manner regulations. *Ward v. Rock Against Racism*, 491 U.S. 781, 797-800, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989) (upholding an ordinance limiting the volume of music at concerts in Central Park's Naumberg Acoustic Bandshell) (citing *Regan v. Time, Inc.*, 468 U.S. 641, 657, 104 S.Ct. 3262, 3271, 82 L.Ed.2d 487 (1984) (White, J.)). Instead, the Court has adopted a "not substantially broader than necessary" standard to evaluate whether a regulation is narrowly tailored. *Id.* at 800, 109 S.Ct. at 2758. We now consider the relationship between the City's interests and the impact of the Ordinance in light of the "not substantially broader than necessary" standard.

a.

Regarding the City's safety interest, the district court concluded that "[t]he evidence linking the regulation to the pedestrian and vehicular safety interests in this case is substantiated and definitive." *Gold Coast*, 798 F.Supp. at 1570. The district court's ruling upholding the provisions regulating placement and installation of newsracks was not cross-appealed. Consequently, we do not second guess the City's assessment that newsracks on public rights-of-way pose certain safety risks that the Ordinance seeks to minimize through its narrowly tailored restrictions. *See Metromedia*, 453 U.S. at 508-09, 101 S.Ct. at 2893 ("We likewise hesitate to disagree with the accumulated, common sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety.").

b.

The Supreme Court has repeatedly deferred to the aesthetic judgments of municipalities and other government bodies when evaluating restrictions on protected expression. *See Taxpayers for Vincent*, 466 U.S. at 807, 104 S.Ct. at 2130; *Metromedia*, 453 U.S. at 512, 101 S.Ct. at 2895; *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S.Ct. 925, 930, 89 L.Ed.2d 29 (1986) ("[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 2453, 49 L.Ed.2d 310 (1976) (plurality opinion))); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99, 104 S.Ct. 3065, 3071-72, 82 L.Ed.2d 221 (1984) (upholding the National Park Service's restrictions on demonstrations in national parks). Likewise, lower courts have upheld ordinances limiting newsracks

based on aesthetic interests.[12] *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 328 (7th Cir.1991) (upholding limitations on the size of newsracks and off-premises advertisements on newsracks because "[c]ities may curtail visual clutter, for aesthetic and safety reasons"); *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir.1989) (upholding permit and insurance requirements as well as restrictions on the size, type, and location of newsracks); *Township of Pennsauken*, 709 F.Supp. at 538 (allowing limitations on the placement and methods of installation for newsracks).

Here, the City has taken several steps to enhance the aesthetics of the business district, including convening a task force to study beautification methods, researching how other cities have dealt with similar issues, developing a proposed Ordinance to correct some of the problems associated with newsracks, and revising that Ordinance based on input from affected parties. Gold Coast argues that the Ordinance goes too far in dictating uniform color and size of lettering because requiring publishers to maintain newsracks in good condition would adequately address the City's complaints of visual blight from unsightly newsracks. Although the district court accepted as credible the testimony of City officials regarding the safety and aesthetic rationales for the Ordinance, the court was not persuaded "that requiring newsracks to be a uniform

[12] Although several district courts have struck down newsrack ordinances for various reasons, their opinions have relied on standards subsequently rejected by the Supreme Court. *See, e.g., Chicago Newspaper Publisher Ass'n v. City of Wheaton*, 697 F.Supp. 1464, 1469 (N.D.Ill. 1988) (rejecting a total ban on newsracks in residential areas under the least-restrictive-means test); *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107, 115-16 (D.R.I.1987) (concluding that a city's aesthetic interests did not justify a newsrack ban because the ordinance was not part of a comprehensive plan); *Philadelphia Newspapers, Inc. v. Borough Council of Swarthmore*, 381 F.Supp. 228, 241-42 (E.D.Pa.1974) (using the least-restrictive-alternative test to invalidate a newsrack ordinance).

color and restricting the size of lettering on the sides of newsracks are regulations narrowly tailored to serve those goals." *Gold Coast*, 798 F.Supp. at 1562, 1571. This argument, however, essentially relies on the less-restrictive alternative analysis rejected in *Ward*.

When we weigh the City's aesthetic interest under the correct standard—"not substantially broader than necessary"—the uniform color and size of lettering requirements are narrowly tailored to achieve the City's objective. The Ordinance does not completely ban newsracks from public rights-of-way or prohibit the sale and distribution of newspapers. Similarly, publishers are permitted to display their name or logo in the color of their choice so long as the lettering is no larger than 1¾ inches. Certainly, the beige and brown colors specified in the Ordinance are not as eyecatching as the deep purple newsracks previously used to display *Exito*, but "that reduction in visibility is the valid aesthetic interest to be served." *Township of Pennsauken*, 709 F.Supp. at 540.

Gold Coast also argues that the color and lettering restrictions are invalid because they do not apply to other fixtures in the business district, such as awnings and trash receptacles. The Supreme Court has allowed cities to enact partial solutions to further their aesthetic interests, *see Taxpayers for Vincent*, 466 U.S. at 811, 104 S.Ct. at 2132 ("Even if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance."); *see also Metromedia*, 453 U.S. at 511-12, 101 S.Ct. at 2894-95, and has explicitly rejected a requirement that such solutions be part of a "comprehensive plan" to improve aesthetics, *Taxpayers for Vincent*, 466 U.S. at 807 n. 25, 104 S.Ct. at 2130 n. 25. Following those cases, this circuit has also permitted partial solutions addressing aesthetic concerns in the commercial speech context. *Supersign of Boca Raton, Inc. v. City of Fort Lauderdale*, 766 F.2d 1528, 1531-33 (11th Cir. 1985) (upholding an ordinance prohibiting advertising

vehicles while allowing advertisements on taxicabs and buses). Furthermore, other courts have upheld newsrack ordinances in the absence of an overall scheme of regulation. *See Chicago Observer*, 929 F.2d at 328-29; *Township of Pennsauken*, 709 F.Supp. at 537. Coral Gables chose to require that all newsracks be painted beige and brown consistent with its Mediterranean theme, but the City was not obligated to dictate the colors of trash receptables or awnings to ensure that the newsrack regulation would survive constitutional attack. For these reasons, we reject the district court's conclusion that the color and size of lettering provisions are not narrowly tailored to serve the City's aesthetic goals.

3.

We now consider the second prong of the time, place, or manner test—whether the disputed provisions of the Newsrack Ordinance allow ample alternative channels of communication. The district court found that ample alternatives were available regarding the City's safety interests, but did not reach this issue regarding its aesthetic interests. *See Gold Coast*, 798 F.Supp. at 1572. As stated previously, the regulations in the Ordinance do not amount to a complete ban on newsracks from public rights-of-way. The placement and installation requirements leave open numerous possible locations for newsracks on public property throughout Coral Gables. Likewise, the color and size of lettering restrictions still allow publishers to display the name and logo of the newspaper in their choice of colors. Because ample alternative channels for communication are available, the disputed color and lettering regulations satisfy this final requirement, and, thereby, constitute valid time, place, or manner restrictions.

B.

Viewing the provisions regarding the color and size of lettering as restrictions on commercial speech, the color and lettering on newsracks could be considered advertise-

ments for the newspaper. Indeed, Gold Coast acknowledges that its brightly colored newsracks and distinctive logo are designed to attract readers.

We begin this analysis by noting that the First Amendment offers less protection to commercial speech than to noncommercial speech. *Metromedia*, 453 U.S. at 505-06, 101 S.Ct. at 2891-92 (stating that, although commercial speech "enjoys a substantial degree of First Amendment protection," such speech "could be forbidden and regulated in situations where [noncommercial speech] could not be"). Under the four-part test for evaluating restrictions on commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), (1) the speech must "concern[] lawful activity and [not be] misleading" to merit First Amendment protection; and the regulation of that speech must (2) "implement a substantial governmental interest"; (3) "directly advance[] that interest"; and (4) "reach[] no further than necessary to accomplish the given objective." *Metromedia*, 453 U.S. at 507, 101 S.Ct. at 2892 (citing *Central Hudson*, 447 U.S. at 563-66, 100 S.Ct. at 2350-51).

Applying the *Central Hudson* test to the Coral Gables Ordinance, the color and lettering on newsracks concerns lawful activity—the identification of newspapers—and is not misleading, assuming that the color and lettering properly identify the newspaper contained in the newsrack. As discussed above, the aesthetic concerns advanced by the City are a substantial governmental interest. In addition, the uniform color and limitation on the size of lettering directly advance the City's interest in minimizing visual blight and ensuring that newsracks blend into the City's Mediterranean theme. The validity of these restrictions ultimately turns on whether they reach no further than necessary to accomplish the City's aesthetic goals.

Although Gold Coast adamantly maintained at oral argument that the color and size of lettering represent

pure, noncommercial speech, transforming its "less-restrictive-alternative" analysis into the commercial speech context, Gold Coast views the restrictions as overbroad because the City could have addressed aesthetic concerns with more modest measures. The specification of a uniform color and the 1¾ inch limit on lettering may appear arbitrary to Gold Coast, yet they represent a decision by the task force and the City Commission after considerable study and input from interested parties. As the Seventh Circuit noted in *Chicago Observer:*

> Whenever government draws a line, there will be cases close to the mark. One can always claim that a small change could have accommodated more conduct, at a little sacrifice in the government's objective. Choosing how much to accommodate at what sacrifice in other objectives is precisely the business of government, for the branches responsible to the people.

929 F.2d at 329. The City's determination that these provisions should apply to newsracks, but not to awnings or trash receptables, represents a partial solution to aesthetic concerns akin to what a plurality of the Supreme Court approved in *Metromedia* and this court accepted in *Supersign.* Furthermore, the Coral Gables Ordinance is distinguishable from the Cincinnati ordinance struck down in *Discovery Network.* Cincinnati's interest in eliminating unsightly newsracks provided no basis for the distinction between commercial and noncommercial speech, and the resultant ban had a minimal impact on aesthetics because the vast majority of the newsracks contained newspapers classified as noncommercial speech. *Discovery Network*, —— U.S. at ——-——, 113 S.Ct. at 1514-15. Thus, the uniform color and size of lettering limitations in the Ordinance are valid restrictions on commercial speech.

C.

We now turn to the district court's analysis of the "equivalent" language of Section 22-164(a). Section 22-

164(a) allows a publisher to use newsracks that are the "equivalent" of those specified in that section of the Ordinance. The City contends that the district court erred in concluding that "the ordinance's use of the term 'equivalent,' without designation of a decisionmaker and in the absence of narrow, objective and definite standards to guide the decision, functions as an unconstitutional prior restraint." *Gold Coast*, 798 F.Supp. at 1566.

One branch of the doctrine of prior restraints has evolved from a "long line of precedent . . . that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood*, 486 U.S. at 757, 108 S.Ct. at 2144 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 321-22, 78 S.Ct. 277, 281-82, 2 L.Ed.2d 302 (1958)). To avoid that risk, "the Constitution requires that the city establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being conisdered." *Id.* at 760, 108 S.Ct. at 2146.

In *Lakewood*, the Supreme Court addressed whether a newsrack licensing ordinance vested unbridled discretion in government officials. The challenged ordinance granted the mayor the authority to approve or reject applications for annual permits to place newsracks on public rights-of-way, subject only to the requirement that he provide reasons for any rejections, and allowed the mayor to condition approval on "any 'other terms and conditions deemed necessary and reasonable by the Mayor.'" *Id.* at 753-54, 108 S.Ct. at 2142. The Court held those portions of the ordinance unconstitutional because there were "no explicit limits on the mayor's discretion," and "[t]he doctrine [forbidding unbridled discretion] requires that the limits . . . be made explicit by textual incorporation,

binding judicial or administrative construction, or well-established practice." *Id.* at 769-70, 108 S.Ct. at 2150-51.

This court has also considered whether certain newsrack regulations constitute prior restraints. In *Miami Herald*, a provision of the Hallandale, Florida occupational license tax on vending machines required a licensee to comply with "all applicable provisions of the city code" before a license would be granted. 734 F.2d at 672. The court held the provision unconstitutional because it "vest[ed] city officials with untoward discretion to deny licenses, and furnishe[d] inadequate safeguards to ensure against abuse of that discretion." *Id.* at 676. In *Sentinel Communications*, the court reviewed an unwritten scheme for regulating the installation of newsracks at interstate rest areas in Florida. Concluding that "some minimal procedures and standards are required here to channel the discretion of [state] officials," 936 F.2d at 1199, the court remanded the case for an evidentiary hearing regarding the permit scheme because "[n]o written rules or regulations govern [the state official] in the exercise of his authority to grant or deny permission for a newspaper to install newsracks in public rest areas, nor are there procedures or standards in place that [he] is obligated to follow when reviewing requests or applications by newspapers to install newsracks at rest areas," *id.* at 1193.

The Coral Gables Ordinance is qualitatively different from the licensing schemes reviewed in *Lakewood*, *Miami Herald*, and *Sentinel Communications*. Coral Gables did not enact a licensing statute with a blanket provision requiring compliance with other unspecified conditions or regulations. Instead, the City developed a written scheme for regulating newsracks through a process that included input from newspaper publishers and other members of the community.

Ordinance 2984 provides explicit limits for City officials' discretion through neutral criteria and procedural safeguards set forth in the text of the Ordinance. Section 22-159(b) designates the Public Works Director as the decisionmaker regarding compliance with the installation and maintenance standards of Section 22-164, which includes the "equivalent" language. In addition, the definition of "equivalent" in Section 22-156(c)—"the same size, dimensions and style of the specified newsrack"—furnishes neutral criteria to guide the Public Works Director's determination of what qualifies as an equivalent newsrack. The permissible modifications of the specified newsrack to accommodate tabloid-style newspapers in Sections 22-159(c)(5) and 22-164(a) do not eliminate these standards and, thereby, vest unbridled discretion in one government official. These modifications were introduced when the Ordinance was amended in 1992, presumably to allow publishers of tabloid newspapers more easily to comply with the requirements of the Ordinance rather than to subject them to the whims of licensing officials. Furthermore, the Ordinance provides procedural safeguards against arbitrary decisionmaking, such as the requirement in Section 22-159(f) that the Public Works Director must state the "specific cause" for denial of a certificate of compliance and the opportunity for appeals from certification denials and judicial review under Section 22-162.

Like many municipal regulations, the Coral Gables Ordinance allows City officials to exercise some discretion in determining an applicant's compliance with its various provisions. This amount of discretion, however, does not reach the level of "unbridled discretion" found in the licensing schemes invalidated in *Lakewood* and *Miami Herald*. Because we conclude that the "equivalent" language in the Ordinance does not operate as a prior restraint, we hold that the district court erred in enjoining the City from enforcing that portion of Section 22-164(a).

D.

On cross-appeal, Gold Coast asserts that the district court erred by not enjoining the enforcement of the insurance requirement of Section 22-160. Gold Coast argues that the City discriminates against newspapers by exempting religious and charitable organizations from licensing provisions and by not requiring insurance from owners of other vending machines. The district court concluded that Gold Coast did not make an adequate showing of disparate treatment. *Gold Coast*, 798 F.Supp. at 1572. The exemption from occupational licensing requirements for religious and charitable organizations, as well as the insurance requirements for vending machines, are located in a separate, and unrelated, chapter of the Coral Gables Code, Chapter 13. The chapter containing the current version of the Newsrack Ordinance, Chapter 22, neither refers to Chapter 13 nor mentions the exemption or insurance requirements found therein. We agree with the district court that Gold Coast has not demonstrated any disparate treatment and, therefore, reject its claim on cross-appeal.

IV.

Under either the standards for limitations on commercial speech or noncommercial speech, the uniform color and size of lettering provisions in the Coral Gables Newsrack Ordinance represent valid time, place, or manner restrictions, or otherwise reasonable restrictions on commercial speech, and do not violate Gold Coast's First Amendment rights. Similarly, the provision regarding "equivalent" newsracks does not operate as a prior restraint because it does not vest unbridled discretion in City officials. Consequently, we conclude that the district court erred in enjoining the enforcement of these provisions of the Ordinance. We agree, however, with the district court's holding that the insurance requirement is constitutional. Accordingly, we REVERSE the district court's grant of injunctive relief regarding the "equivalent"

language of Section 22-164(a), the uniform color requirement of Section 22-164(b), and the limitation on the size of lettering in Section 22-164(c); we AFFIRM the district court's denial of injunctive relief regarding the remaining provisions of the Ordinance, including the insurance requirement of Section 22-160.

IT IS SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 92-0826-CIV

GOLD COAST PUBLICATIONS, INC.,
a Florida corporation d/b/a Exito!,
Plaintiff,

v.

GEORGE M. CORRIGAN, JAMES BARKER, *et al.*,
Defendants.

July 9, 1992.

ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

MORENO, District Judge.

This case arises from a dispute over the regulation of newsracks in the city of Coral Gables, Florida. After city officials seized its newsracks, Gold Coast Publications, as publisher of a new tabloid newspaper, *Exito*, filed suit against the city of Coral Gables and its officials, alleging that the city's ordinance regulating newspaper racks is facially unconstitutional.[1]

The ordinance requires uniform color, size and design for the racks. It also provides that the newsracks must

[1] Another tabloid-style newspaper, *New Times*, was permitted to intervene and support plaintiff's challenge to the ordinance. *New Times* is currently attacking the ordinance in a separate action in state court.

have pedestals and be secured to the sidewalk. Additionally, the ordinance contains limits as to the size of the lettering on the sides of the newsracks and their location on the public right of way.[2] The plaintiff further claims that the requirements of rack uniformity violate its trademark *Exito*, with its unique purple and green colors.

The city and its officials maintain that the Coral Gables newsrack regulations do not regulate the content or any other speech aspect of newspapers, but simply the racks used for distribution. The city claims that the regulations are permissible time, place or manner regulations that serve the safety and aesthetic interests of its citizens.

There is no dispute that safety and aesthetics are significant governmental interests. Thus, the court's inquiry revolves around whether the ordinance is narrowly tailored to serve those interests and the availability of alternative channels of communication. The court finds that, with the exception of the regulations on color of the racks, size of the lettering, and the use of the term "equivalent", the ordinance is constitutionally valid. Those sections are stricken and severed as unconstitutional. If the Coral Gables city commission passes a new ordinance, the court is confident that it will consider the words of Thomas Jefferson:

> The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether

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[2] On March 31, 1992 the City amended previous ordinance No. 2911. The new ordinance, No. 2984, deleted regulation of newsracks on private property and allowed modifications for tabloid-style newspapers. The ordinance continues to call for gloss brown pedestals, along with gloss beige sides and doors. Only the name of the newspaper is allowed on the side of the rack in letters no larger than $1\frac{3}{4}$ inches. Both ordinances will be referred to throughout the text of this opinion. The full texts of the ordinances are attached.

> we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.[3]

FINDINGS OF FACT

The court held an evidentiary hearing on plaintiff's request for declaratory and preliminary injunctive relief, pursuant to 28 U.S.C. § 2201 and Rule 65, Fed.R.Civ.P., over a period of several days. At this hearing, both sides presented several witnesses.

Edward McHale, a trademark attorney, provided uncontroverted testimony as to the ability of Exito to obtain federal trademark protection for its three dimensional logo and design. Exhibits were introduced showing *Exito*'s application for federal trademarks.

Alfredo Duran, the publisher of *Exito*, testified that the type of audience targeted by *Exito* included young upwardly mobile Hispanics, constituting a large cross-section of the Coral Gables population. Duran further testified as to the marketing purpose for the unique design and color of *Exito*. He also opined that the required beige rack gives the impression of a bland publication. The Court finds this testimony credible.

There is also no question that *Exito* is not available through home subscription or delivery, and that its only form of distribution is through the newsracks. The Court also accepts the testimony that *Exito*'s circulation substantially increased in Coral Gables when its six racks were confiscated. The Court further finds that *Exito*'s newsracks, by their trademark dress and color scheme, cause the publication to stand out from the rest.

James Bustraan, an executive in charge of circulation and distribution for *Exito*, described the seized newsracks

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[3] Letter from Thomas Jefferson to Colonel Edward Carrington (January 16, 1787).

as ones constructed to accommodate tabloid-style newspapers. He further testified that concrete blocks on the inside bottom of the racks would avoid tippage and prevent injury. He conceded that vandals could move the racks, but testified that it is important for a new publication to have the ability to move racks frequently from one location to another in order to increase circulation.

George Kingsbury, the Coral Gables newsrack project manager, provided a history of the ordinances. He stated that Coral Gables is known as the "City Beautiful" for its constant concern for safety and aesthetics. He reiterated that those interests moved the city commission to pass the challenged ordinance.

Kingsbury reasoned that the bolting of newsracks to the sidewalks prevented their movement by vandals or weather conditions. He testified that the limits on rack location, improved unimpeded ingress and egress from buildings, widened access for handicapped persons' mobility and prevented any other blockage of pedestrian traffic. Kingsbury noted a possible greater safety concern for unmarked crosswalks, due to a higher degree of straying by pedestrians in those unmarked crosswalks as opposed to marked crosswalks.[4]

Kingsbury was also recalled by the City to provide testimony and conduct a demonstration as to the adaptability of a seized *Exito* newsrack into one mounted on a pedestal. The demonstration revealed that the confiscated newsrack could be conformed to the requirements of the ordinance, yet continue to allow for tabloid-style newspapers.

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[4] Section 22-166 of the ordinance proscribes newsrack locations within five feet of a marked crosswalk and within ten feet of an unmarked one. It also prohibits installation of the racks within ten feet of a fire hydrant, five feet of a driveway, five feet ahead and fifteen feet behind a bus stop, two feet of a bus bench, two feet of parking meters, street lights, utility poles, three feet of a display window, and five feet of a building entrance.

Ewell Johnson, Fort Lauderdale Sun Sentinel's chief of circulation, was called by *Exito* to demonstrate the costly burdens of modifying existing *Exito* racks into ordinance-conforming pedestal mounts. Donald Saxon, a Caspar Wireworks Sho-rack employee, provided a fuller explanation of these costs.

The city's witnesses included Maria Albero, a project engineer for the Public Works Department, who testified as to the manner of collecting and handling of newsrack licensing fees.

The Coral Gables city attorney, Robert Zahner, delineated the safety and aesthetics concerns shared by the various entities of the city including the Public Works Department, Zoning Board and the Architectural Board. Zahner provided a brief history of the challenged ordinance. He also explained the distinct functions of the various city departments and boards.

City planning director Diana Wheeler narrated descriptively the city's aesthetic and safety reasons for the establishment of the newsrack ordinance. The court accepts as credible the entire testimony of these three Coral Gables city employees.

Alan Richman, the code enforcement officer who is named as a defendant along with the City and its commissioners, testified that he picked up six newsracks. He clarified that none were taken from private property.

The two intervenor witnesses credibly testified as to the negative effect on circulation caused by the forced use of generic newsracks.

CONCLUSIONS OF LAW

Prerequisites to injunctive relief

Rule 65 of the Federal Rules of Civil Procedure authorizes the district court to grant preliminary injunctive relief at its discretion. *United States v. Lambert*, 695

F.2d 536 (11th Cir.1983); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328 (5th Cir.1981).

In exercising its discretion, the court must consider and balance the four recognized prerequisites to preliminary injunctive relief as enunciated by the Eleventh Circuit Court of Appeals: (1) a substantial likelihood that the movant will prevail on the underlying merits of the case, (2) a substantial threat that the moving party will suffer irreparable damage if relief is denied, (3) a finding that the threatened injury to the movant outweighs the harm the injunction may cause defendant, and (4) a finding illustrating the extent to which granting the preliminary injunction will disserve the public interest. *Lucero v. Operation Rescue*, 954 F.2d 624 (11th Cir. 1992); *Tally-Ho, Inc. v. Coast Community College District*, 889 F.2d 1018 (11th Cir.1989).

The plaintiffs have the burden of persuasion on *all* four preliminary injunctive standards. *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir.1983). The court is always guided by the underlying premise that "a preliminary injunction is an extraordinary and drastic remedy." *Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir.1974). In the free speech context, the questions of irreparable harm and likelihood of success on the merits are necessarily subsumed into a First Amendment inquiry. *Gannett Satellite Information Network, Inc. v. Township of Pennsauken*, 709 F.Supp. 530 (D.N.J.1989).

If the City of Coral Gables is abridging First Amendment rights, *Exito* is likely to succeed on the merits. Additionally, it is well-settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); *Cate v. Oldham*, 707 F.2d 1176 (11th Cir.1983). If the ordinance violates the First Amendment rights of *Exito* and the public, the balance of equities will not rescue the defendants.

Therefore, the issuance of a preliminary injunction in the context of free speech turns solely on whether the challenged ordinance violates the First Amendment.

Prior restraint and procedural due process

Initially, this Court must decide whether it is appropriate for *Exito* to challenge the newsrack ordinance on its face. The court acknowledges that the law does not generally favor facial attacks on the validity of ordinances, but prefers to review their constitutionality as applied to individual litigants. *See Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir.1991). The United States Supreme Court recently addressed the issue of facial constitutional challenges in the context of the First Amendment and a local government newsrack ordinance. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988).

In *Lakewood*, the newspaper alleged that a local ordinance was facially unconstitutional because it gave a government official unfettered discretion over whether to permit or deny expressive activity. The Supreme Court referred to a long line of cases holding that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially, without the necessity of first applying for, and being denied a license. *Id.* at 755-56, 108 S.Ct. at 2142-43.[5]

Several policy considerations governed the *Lakewood* Court's fashioning of a two-part test in determining the appropriateness of a facial constitutional challenge. First, in the arena of freedom of speech, a licensing statute

[5] *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. *Shuttlesworth*, 394 U.S. at 151, 89 S.Ct. at 938-39; *Cox v. Louisiana*, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). Second, the mere existence of a licensor's unfettered discretion, when added to the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused. *Lakewood*, 486 U.S. at 757, 108 S.Ct. at 2144.

Finally, if the ordinance does not contain express standards, the court's task in distinguishing, "as applied", between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power becomes nearly impossible. *See id.* Marshaling these policy concerns, the *Lakewood* Court established a two-part test to ascertain the appropriateness of a facial challenge.

The Court held that a plaintiff may challenge a licensing ordinance facially whenever (1) it gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers, and (2) it has a close enough nexus to expression or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks. *Id.* 486 U.S. at 760, 108 S.Ct. at 2145.

Applying this test, the *Lakewood* Court permitted a facial challenge in view of the combination of two factors. The City of Lakewood ordinance required the newspaper to apply annually for newsrack licenses. This multiple or periodic licensing requirement allowed the licensor substantial power to discriminate on the content or viewpoint of speech, by reviewing speech uttered under previously approved licenses, prior to issuing the next license. Additionally, the licensing system at issue in *Lakewood* was directed narrowly and specifically at the circulation of

newspapers, which is expression or conduct commonly associated with expression.

In *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir.1991), a newspaper company challenged an essentially standardless licensing scheme for regulation of newsracks at Florida interstate rest areas. The Eleventh Circuit, in reversing the district court, concluded that the regulatory ordinance appeared to be facially infirm in putting completely standardless and unfettered discretion for issuing newsrack licenses into the hands of one Tallahassee bureaucrat.

Applying the *Lakewood* test for facial challenges to the Coral Gables ordinance, this court is convinced that *Exito*'s facial challenge is justified. Similar to the Lakewood ordinance, the Coral Gables ordinance contains a multiple or periodic licensing requirement. In particular, section 22-159(c) of Ordinance No. 2984 provides:

> If at any time after initial application for an installation certificate of compliance a publisher wishes to install additional newsracks, then subsections (c), Applications, and (d), Procedure, above are to be repeated in accordance with the provisions of this article.[6]

Accepting as true *Exito*'s assertion that young newspapers need to use a trial and error method to identify the prime locations for distribution of newspapers by newsracks, it would appear that the additional certificate of compliance requirement in Section 22-159(c) is not only multiple, but also periodic.

The City of Coral Gables gives government officials "substantial power to discriminate based on the content or viewpoint of speech", because they may review speech

[6] The interpretation of this provision as a multiple licensing requirement is consistent with the provision in Section 22-158 which mandates a one-time only certificate of compliance for each newsrack installed.

already uttered under previously issued newsrack licenses in considering whether to issue certificates of compliance for additional newsracks. Moreover, it is clear that this law is directed narrowly and specifically at conduct commonly associated with expression: the distribution and circulation of newspapers by newsrack. *See Lakewood*, 486 U.S. at 760, 108 S.Ct. at 2145. *Exito*'s facial constitutional challenge to the Coral Gables newsrack ordinance is warranted under the policy considerations and two-part test enunciated in *Lakewood* and followed in *Watts*.[7]

Prior restraint and the term "equivalent"

Deciding that *Exito* has standing to raise a facial constitutional challenge does not end the prior restraint inquiry. *Exito* primarily contends that the ordinance operates as an unconstitutional prior restraint by using the term "equivalent" in the section controlling installation and maintenance of newsracks.[8] *Exito* argues that constitutionally impermissible discretion is vested through the term "equivalent", since the ordinance is unclear as to who decides what constitutes an "equivalent" newsrack, and is also void of the standards to be applied in determining "equivalent" status.

A law that subjects the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority, is unconstitutional. *Shuttlesworth v. City*

[7] An "as applied" challenge may be appropriate here as well, since the parties stipulated that had *Exito* and intervenor *New Times* applied for a permit under the March 31, 1992 revised ordinance No. 2984 with their current newsrack, the application would have been denied.

[8] Newsracks shall be single pedestal TK-80PM or K-80PM SHORACK with special pedestal mount and fourteen inch (14") square base plate (mandated) or TK-80 or K-80 SHORACK with special pedestal and fourteen inch (14") square base plate (allowed only if demand warrants at the installation location) or *equivalent*. § 22-164(a).

of Birmingham, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). Any licensing system which operates as a prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed. 2d 649 (1965); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir.1984).

It is apparent from a review of the ordinance, facts and testimony at the hearing, that the term "equivalent" violates prior restraint proscriptions of the First Amendment. First, it is uncertain who decides what constitutes an equivalent newsrack. George Kingsbury, Coral Gables newsrack project manager, testified that some person or group of persons from the Department of Public Works makes the decision. Additionally, Kingsbury speculated that outside consulting services may be used.

The language of the ordinance itself suggests that perhaps only the Public Works Director makes the decision. Section 22-159(b) states that "[t]he Public Works Director shall provide . . . review and approval only as to compliance with . . . Sec. 22-164, Installation and Maintenance." If only the Public Works Director decides what constitutes an equivalent, then the term impermissibly vests standardless discretion in one official, like the unguided bureaucrat in *Watts*.

Second, the language in the ordinance that the city believes provides narrow, definite and objective standards for determining an equivalent newsrack only compounds the confusion and leaves the decisionmakers to their own discretion. A newspaper publisher attempting to comply with the ordinance is confronted with the definition of "equivalent" newsrack as "any newsrack which is of the same size, dimensions and style of the specified newsrack." § 22-156(c).[3] Section 22-159(c)(5) specifies that a writ-

[3] This definition is nearly the same as the one provided by Black. Equivalent means "[e]qual in value, force, measure, volume, power

ten application for an installation certificate of compliance must contain the type or brand of newsrack, including an illustration and description of the newsrack and mount if other than a single pedestal TK-80PM SHORACK or modified rack for vertically-formatted newspapers under Section 22-164(c).

Exito desires to use a Caspar 33CT brand newsrack which measures 49″ in height, 16″ in width and 20″ in depth. The TK-80 SHORACK specified in Sections 22-159(c) and 22-164(c) measures 48⅝″ in height, 19¼″ in width and 16¼″ in depth. Under the definition in Section 22-156(c), *Exito*'s newsrack cannot possibly constitute an "equivalent" since it is unequal in size to the specified TK-80PM rack. Yet the application provision in Section 22-159(c) seems to indicate that racks other than the specified TK-80PM or modified TK-80PM [10] will be permitted, presumably under the term "equivalent".

It is logically impossible for the TK-80PM rack specified in Section 22-164(c) to simultaneously be modified to accommodate vertically-formatted newspapers under the provisions of that section, and satisfy the definition of equivalent as being the same size, dimensions and style of the TK-80PM rack. Furthermore, the court accepts as true *Exito*'s demonstration of the difficulty inherent in attempting to display vertically formatted tabloid-type newspapers in the TK-80 rack which more readily accommodates horizontally-formatted newspapers.

Kingsbury's testimony only further clouded the issue of "equivalent" newsracks. At first, he testified that *Exito*'s Caspar 33CT newsrack did not have the pedestal required

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and effect or having equal or corresponding import, meaning or significance." *Black's Law Dictionary* 486 (5th ed. 1979).

[10] Under Section 22-164(c), [m]anufactured modifications to the door, window and cabinetry for the above described [TK-80PM or "equivalent"] newsracks to accommodate vertically-formatted, "tabloid-type" newspaper display and distribution are acceptable.

of the TK-80 rack, but had the potential of being an "equivalent" newsrack in other respects. He neither clarified what those other respects might be, nor pointed out where they might be located in the ordinance.

Later in his testimony, the city introduced one of *Exito*'s confiscated Caspar 33CT newsracks, painted beige and affixed with a pedestal mount, and Kingsbury testified that this modified rack would be an "equivalent" under the ordinance. Utilizing the only standard present in the ordinance for determining "equivalent", the definition in Section 22-156(c), the court fails to see how the modified Caspar 33CT rack is of the same size, style and dimensions as the specified TK-80 rack.

A practical illustration will serve to demonstrate how the term "equivalent" operates as an unconstitutional prior restraint by impermissibly vesting standardless discretion in whomever ultimately issues the newsrack license. A Coral Gables city official, unhappy with a recent issue of *Exito*, where a writer criticizes a Coral Gables taxation plan, may deny additional certificates of compliance on the grounds that the newsrack is not an "equivalent". When pressed for a rationale, the official can only point to the definition of "equivalent" in Section 22-156(c).

The inability of the licensor to delineate the express standards in the ordinance used in arriving at the decision of what constitutes an "equivalent", makes it impossible for the court to determine whether the licensor is legitimately denying a certificate or illegitimately censoring speech based on its content. *See Lakewood*, 486 U.S. at 758, 108 S.Ct. at 2144. In order for the term "equivalent" to meet constitutional standards in this context, the ordinance must contain a section outlining solely the standards guiding the licensor's determination of "equivalent". Then, and only then, would a court be able to discover whether the denial satisfies the dictates of the First Amendment. If not, the licensor will succeed in masking unconstitutional restrictions on protected speech

by using two seemingly meaningless words: not equivalent.

This scenario is especially forceful here. The city's notice of violation merely informed *Exito* that it was in violation of Chapter 28, Article VI of the city code by "[m]aintaining one or more newsracks on public rights-of-way which are not in compliance with Chapter 28, Article VI." The notice does not indicate any specific violations of particular sections. It merely makes a blanket general statement that *Exito*'s newsracks are not up to par with the city code. It might just as easily have said, "Your newsracks are not equivalent". Stated either way, the notice is insufficient to satisfy the demands of procedural due process to which *Exito* is entitled.

It is not necessary for the court to rule on *Exito*'s contention that the ordinance's provision for local or judicial review is constitutionally insufficient. Section 22-162 provides that an applicant who has been denied a certificate may file an appeal to the city commission, which will be heard within 30 days of the filing of the appeal or at the next regulatory scheduled agenda, whichever is sooner. *Exito* complains that this section violates its right to procedural due process, since it fails to set forth a time frame in which the city must render a decision on appeal.

Since the court finds that the ordinance's use of the term "equivalent", without designation of a decisionmaker and in the absence of narrow, objective and definite standards to guide the decision, functions as an unconstitutional prior restraint, it need not reach the time delay issue. Even expedited judicial review does not adequately compensate for the lack of concrete standards to guide the decisionmaker's discretion. *Lakewood*, 486 U.S. at 771, 108 S.Ct. at 2151. The term "equivalent" must be stricken from the ordinance. Any other conclusion would take the teeth out of the law of prior restraint and reduce it to insignificant proportions.

Severability

Severability of a local ordinance is a matter of state law. *Mayflower Farms, Inc. v. Ten Eyck*, 297 U.S. 266, 56 S.Ct. 457, 80 L.Ed. 675 (1936). An invalid or unconstitutional section of a statute or municipal regulation is severable from the statute or regulation as a whole, and the surviving, valid portions are enforceable, if:

> the unconstitutional portion of the ordinance can be eliminated without doing violence to the legislative purpose expressed in the valid portion, if the remaining portion is complete in itself and if the valid and invalid portions are not so inseparable that one portion would not have been enacted without the other.

Gates v. City of Sanford, 566 So.2d 47 (Fla. 5th DCA), *review dismissed*, 576 So.2d 287 (1990). One of the factors that must be considered in determining whether the valid portions of a statute are "separable" from portions declared invalid is the existence of a severability clause. *Tropical Park, Inc. v. Department of Bus. Reg.*, 433 So.2d 1329 (Fla. 3d DCA 1983).

Here the purpose of the ordinance was to promote the public health, safety and welfare through the regulation of placement, type, appearance, servicing and insuring of newsracks on public rights-of-way.[11] That purpose is not affected by the invalidity of the term "equivalent". The invalid portion is easily severable from the valid portions of Sections 22-156 and 22-164(a), and the remaining portions are complete in themselves. Further, the fact that the City of Coral Gables ordinance contains a severability clause in Ordinance No. 2911, Section 28-47, § 4, is evidence that the valid portion would have been enacted even without the equivalence provision. Thus, even though the Court strikes the term "equivalent", the remainder

[11] Ordinance No. 2911, § 28-38.

of the ordinance survives and stays in full force and effect.

Time, place and manner regulations

Exito challenges numerous provisions in the ordinance, contending that they bear no rational relation to health, safety and welfare or are unconstitutionally overbroad. Traditionally, the First Amendment guarantees of freedom of the press have been extended to the right to distribute newspapers. "Liberty of circulating is an essential to [freedom of the press] as liberty of publishing; indeed without the circulation, the publication would be of little value." *Lovell v. Griffin*, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949 (1938) (*quoting In re Jackson*, 96 U.S. 727, 733, 24 L.Ed. 877 (1878)); *see also, News and Sun-Sentinel Co. v. Cox*, 702 F.Supp. 891 (S.D.Fla. 1988); *Southern New Jersey Newspapers, Inc. v. Department of Transportation*, 542 F.Supp. 173 (D.N.J.1982). The protection accorded liberty of circulation, flows not only from the newspaper's right of publication, but also from the public's right of access to newspapers. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F.Supp. 228 (E.D.Pa.1974).

Unquestionably, these reciprocal rights of circulation and of access logically confer protection to publishers of the right to distribute newspapers by newsracks. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991); *Miami Herald Pub. Co. v. City of Hallandale*, 734 F.2d 666 (11th Cir.1984).[12] The degree to which

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[12] For other cases recognizing that the First Amendment fully protects the right of newspaper publishers to distribute newspapers by newsracks, *see Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Authority*, 745 F.2d 767, 777 (2d Cir.1984); *Gannett Satellite Info. Network, Inc. v. Township of Pennsauken*,

the government may regulate communicative activity protected by the First Amendment depends upon the nature of the forum in which the First Amendment rights are sought to be exercised. *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). In short, the degree of protection provided by the Constitution depends "on the character of the property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983).

In this case, the "property at issue" is public rights-of-way in the city of Coral Gables. Public streets, sidewalks, and parks are classic examples of traditional public forums. *Frisby v. Schultz*, 487 U.S. 474, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). From ancient times, these traditional public forums have been held open to the public for purposes of speech and debate. *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). Indeed, in these traditional public forums, the city's authority to restrict speech is at its minimum. Time, place and manner regulations are valid only if they are content-neutral, narrowly tailored to serve a significant government interest, and retain ample alternative channels of communication. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955.

Content-based or content-neutral

Section 28-38(h) of Ordinance No. 2911 declares that one of the purposes of the ordinance is to treat all newspapers equally regardless of their size, content, circulation, or frequency of publication. The restrictions, on their face, apply equally to all newsracks in the public rights-of-way. That is all that is required to demonstrate

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709 F.Supp. 530, 536 (D.N.J.1989); *Chicago Newspaper Publishers Ass'n v. City of Wheaton*, 697 F.Supp. 1464, 1466 (N.D.Ill.1988); *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107, 110 (D.R.I.1987); *Philadelphia Newspapers, Inc. v. Borough of Swarthmore*, 381 F.Supp. 228, 240 (E.D.Pa.1974).

content-neutrality in a First Amendment context. *See, e.g., Gannett,* 745 F.2d at 773; *Pennsauken,* 709 F.Supp. at 536; *Wheaton,* 697 F.Supp. at 1469; *Providence Journal,* 665 F.Supp. at 112. *Exito*'s broad, sweeping statement that the ordinance is not content-neutral because it treats broadsheet and tabloid media differently in practice, is irrelevant to the content-neutrality inquiry.

Narrowly tailored to serve significant government interests

The second prong of the time, place, manner analysis breaks down into two levels. First, the government bears the burden of asserting a significant state interest. *Providence Journal,* 665 F.Supp. at 113. The government must next show that the regulations in the ordinance are narrowly tailored to serve the asserted significant government interest. The city of Coral Gables newsrack ordinance expressly avers that its primary interests are improvement of pedestrian and traffic safety and enhancement of aesthetics.

Safety interests

It is undisputed that the city of Coral Gables may enact time, place and manner regulations on protected speech in a traditional public forum to promote safety interests. *Heffron v. International Soc. for Krishna Consciousness,* 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981). The purpose and criteria section at the beginning of the ordinance outlines the general safety interests that it seeks to secure.

The ordinance strives to preserve pedestrian and traffic safety at street corners, improve ingress and egress from buildings, and increase public access to traffic signals and utility poles. Kingsbury, the newsrack project engineer, testified that some of the safety concerns are to avoid blockage of pedestrians in crosswalks or other highly concentrated pedestrian areas, improve ingress and egress

from buildings, avoid congesting ramps designed for handicapped individuals and deter blocking of parking areas and emergency vehicles. Kingsbury further testified that the requirement of bolting newsracks [13] to the ground by pedestal discourages vandalism and wards off competing newspapers who might shift the racks.

Throughout its pleadings and at the hearing, *Exito* complained that the ordinance provisions for newsrack placement, mounting, installation, maintenance and specific prohibitions [14] bear no rational relation to health, safety and welfare or are unconstitutionally overbroad. For these place and manner restrictions to be valid, however, they must only be narrowly tailored to serve the expressed safety interests.

The city points out that the United States Supreme Court has recently clarified the "narrowly tailored" prong of the *Perry* test in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). In *Ward*, the Court rejected the requirement that the particular regulation or provision be the least speech-restrictive alternative. *Id.* at 799, 109 S.Ct. at 2758. The *Ward* Court stated:

> [T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation . . . So long as the means chosen are not substantially broader than necesary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Id. at 799-800, 109 S.Ct. at 2758-59 (citations omitted). The city summarily concludes that their legitimate safety

[13] Ordinance No. 2984, § 22-164(f).

[14] Ordinance No. 2984, §§ 22-163 to 22-166.

interests would be "served less effectively" in the absence of regulations, therefore the regulations must be valid.

If the city reads *Ward* to mean that the court should automatically defer to a local government's judgment whenever the local government enacts regulation intended to serve what it views as a significant state interest, then the city is mistaken. *Ward* does not stand for the proposition that the court has, in effect, become a ministerial rubber stamp whenever a local government raises the banner of safety or aesthetics.

To be sure, the *Ward* court outlined the proper relationship between the court and the legislature when balancing the concerns of the First Amendment against a local government's legitimate safety interests and the means chosen to effectuate those interests. The *Ward* court certainly concluded that it would be improper for a court to invalidate a regulation, simply because it disagreed with the government over how best to achieve the asserted state interest.

But the *Ward* Court did not remove all analytical power and judicial scrutiny from the process of evaluating the constitutionality of a time, place or manner regulation on protected speech. *Ward* specifically noted that its standard for determining narrowly tailored does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. *Id.* at 799, 109 S.Ct. at 2758. A government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. *Id.* Especially when the First Amendment concerns of freedom of speech and press are at stake, this Court will not be the first to suggest that judicial review has been excised.

With that in mind, the court proceeds to evaluate whether the regulations are narrowly tailored to serve the city's significant interest in pedestrian and traffic safety. If the significant government interest is providing for

pedestrian safety, then limitations on (1) the number of newsracks which may be placed in any one area, (2) the location of newsracks in relation to areas of heavy pedestrian traffic, and on (3) the height, depth and length of newsracks, are certainly narrowly tailored.

If the asserted government interest is egress and ingress from buildings, then a limitation on the position of newsracks in relation to structures on the public right-of-way burdens no more speech than is necessary to serve that interest. *Exito* argues that there is no reason to distinguish between marked and unmarked crosswalks. Section 22-166(1) forbids placement of any newsrack within five feet of any marked crosswalk, but (2) prevents placement within ten feet of any unmarked crosswalk.

In fact, *Exito* contends that there should be a greater safety concern with placement near marked crosswalks. Kingsbury testified that the city is more concerned with respect to safety near unmarked crosswalks, since pedestrians tend to stray further when crossing at these intersections. The court will not substitute its judgment for that of an elective body.

Other district courts that have invalidated place and manner restrictions for failing the narrow tailoring requisite, have done so where broadly asserted safety interests are unsubstantiated by the evidence, *Pennsauken*, 709 F.Supp. at 536-37, or where the evidence connecting the regulation to the safety interest is speculative, *Southern New Jersey*, 542 F.Supp. at 186. The evidence linking the regulation to the pedestrian and vehicular safety interests in this case is substantiated and definitive.

Indeed, the narrowly tailored regulations for safety interests in the Coral Gables ordinance are similar to those found constitutional in *Providence Journal Co. v. City of Newport*, 665 F.Supp. 107 (D.R.I.1987). Like the photographs admitted in *Providence Journal*, the photographs here showed newsracks piled up at many intersections and crosswalks. The *Providence Journal* court

found that heavy tourist traffic surrounding these stacks of newsracks could cause spillover into the street and lead to significant safety hazards for pedestrians and drivers. The newsrack clusters also reduced available sidewalk space for handicapped pedestrians.

The city of Newport ordered the sidewalks to be completely cleared of all newsracks, and the court decided that this banishment markedly advanced the city's safety interest in unobstructed pedestrian flow. Here, the regulations do not ban all newsracks on the streets and sidewalks, but merely restrict quantity at certain locations and prescribe specific distances from crosswalks and structures. On the evidence admitted, the court finds that the mounting, installation, placement, and maintenance regulations burden no more speech than is necessary to further the city's legitimate safety interest.

Aesthetic interests

The city of Coral Gables may also enact valid time, place and manner regulations for newsracks to advance aesthetic interests. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981). The ordinance notes that it strives to promote public welfare by "relocating or replacing newsracks which result in a visual blight . . . or which unreasonably detract from the aesthetics of store window displays, adjacent landscaping and other improvements."[15] The sections which most directly bear on the enhancement of aesthetics are the regulations of newsrack color and the size of the lettering on the sides of the newsrack.[16]

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[15] Ordinance No. 2911, § 28-38(e).

[16] Newsracks on public rights-of-way in Coral Gables must be beige or brown, and the lettering on the sides of the racks may not exceed 1¾" in height. Ordinance No. 2984, § 22-164(b), (c).

First, it is important to discuss briefly the test applied when evaluating time, place, or manner regulations that seek to promote aesthetic interests. In *Metromedia*, the Supreme Court recognized the subjective nature of aesthetic judgments, and concluded that lower courts must carefully scrutinize regulations to determine that they are not a "public rationalization of an impermissible purpose." *Metromedia*, 453 U.S. at 510, 101 S.Ct. at 2893. In a concurring opinion, Justice Brennan suggested that, before deferring to a city's judgment, a court must be convinced that the city is seriously and comprehensively addressing aesthetic concerns with respect to its environment. *Id.* at 531, 101 S.Ct. at 2904 (Brennan, J., concurring).

In *Vincent*, the Supreme Court reaffirmed its holding in *Metromedia* that a court should show considerable deference to a city's aesthetic judgments. *Vincent*, 466 U.S. at 807, 104 S.Ct. at 2130. The *Vincent* majority expressly rejected Justice Brennan's position that a court must only defer where the city demonstrates a serious and comprehensive plan concerning aesthetics. *Id.* n. 25.

Once again, however, the Supreme Court has not concluded that lower federal courts become ministerial rubber stamps whenever a local government asserts a significant state interest. *Wheaton*, 697 F.Supp. at 1470. The court must determine whether the state interest is sufficiently substantial to justify the effect of the ordinance on plaintiff's expression, and whether the effect is no greater than necessary to accomplish the city's purpose. *Vincent*, 466 U.S. at 805, 104 S.Ct. at 2128-29. Aesthetics has a higher subjective component than safety, but that does not mean that "simply uttering the words aesthetics or appearance should magically alleviate any need for evidence connecting the regulation to the state interest, particularly where fully protected First Amendment interests are at stake." *Southern New Jersey Newspapers*, 542 F.Supp. at 186.

The city reiterated repeatedly that Coral Gables, the City Beautiful, has focused on developing its aesthetic environment since its inception. The city identified the substantive aesthetic evils as "visual blight" and "detractions from aesthetics". The court is not persuaded, however, that requiring newsracks to be a uniform color and restricting the size of lettering on the sides of newsracks are regulations narrowly tailored to serve those goals.

The city cites numerous cases upholding location and size requirements for newsracks and billboards, but no case permitting regulations which impose uniformity of color and restrict the size of lettering to as small as 1¾". Merely referring to a group of newsracks of different colors as "visual blight" does not justify the color and size of lettering restrictions. In *Providence Journal*, the city of Newport showed photographs of dented, rusted and otherwise poorly maintained racks. The photographs admitted here show a multitude of colors, but the newsracks are not in a poor state of repair.

Moreover, regulations mandating uniformity of newsrack color and size of lettering are especially offensive to First Amendment concerns, when the city authorizes a variety of colors and lettering size on other street furniture and architectural projections. The photographs show awnings over buildings in Coral Gables representing a large spectrum of colors. Trash barrels, owned by the city, are multi-colored and the lettering on the sides of these receptacles is not limited to 1¾". The University of Miami may identify its buildings with four-inch lettering on signs while newsracks are limited to 1¾" lettering. The banner of aesthetics, here, can quite possibly be a public rationalization for the impermissible purpose of targeting newsracks.

The city simply has not shown how requiring newsracks to be gloss brown or beige and limiting the size of lettering on the sides of newsracks advances its interest in aesthetics. Uniform color essentially renders the news-

racks invisible, which is especially detrimental to new market entries such as *Exito* or *New Times*. Where a newspaper relies largely on its unique coloring and logo scheme to improve its circulation, and the public right of access to newspapers depends on its familiarity with that scheme, restrictions mandating homogeneity of color are not merely incidental, but rather disproportionate restraints on freedom of expression. The effect on *Exito*'s First Amendment freedom is broader than necessary to serve the city's weighty aesthetic goals, and is thus constitutionally intolerable.

Ample alternative channels of communication

Even if the city shows that its time, place and manner regulations on newsracks are content-neutral and narrowly tailored to serve a significant interest, it must still show that "ample alternative channels of communication" remain open for the expressive activity. *Ward*, 491 U.S. at 791, 109 S.Ct. at 2753; *Perry*, 460 U.S. at 45, 103 S.Ct. at 954-55. The time, place or manner test has three parts and *Perry* lists them in the conjunctive. That is, an ordinance must satisfy all three of the criteria to be constitutionally sufficient. *Providence Journal*, 655 F.Supp. at 117. Thus, the city's assertion that ample alternative channels necessarily exist via narrow tailored permissible uses is categorically rejected.

The city argues that ample alternative channels exist because *Exito* and *New Times* can distribute their newspapers without government interference on private property. Availability from newsracks on private property is irrelevant from a constitutional standpoint. *Swarthmore*, 381 F.Supp. at 242 n. 8. When evaluating the availability of alternative channels, courts must consider the alternative channels left open within the public forum, not ones available on private property. *Providence Journal*, 665 F.Supp. at 118 (*citing Heffron*, 452 U.S. at 654-55, 101 S.Ct. at 2567-68).

With respect to safety interests, the Court finds that ample alternative channels of communication exist. The city has not completely banned newsracks from the public rights-of-way in Coral Gables. As long as *Exito* complies with the reasonable placement and mounting restrictions in the ordinance, it may be amply distributed. It is unnecessary to analyze ample alternative channels with respect to aesthetic interests, since the color and size of lettering restrictions violate the narrow tailoring requirement and are thus constitutionally inadequate.

Fees, insurance, and trademark rights

It is well established that a licensing fee is permissible, but a state or municipality may charge no more than is necessary to cover administrative costs. *Cox v. New Hampshire*, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). The government may not profit by imposing licensing or permit fees on the exercise of First Amendment rights. *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir.1991).

The ordinance requires a one-time $50 certificate of compliance fee, $10 per installed newsrack, and a $5 reinspection fee for failed inspections. It also specifies that any funds left over after defraying administrative costs will be returned to newspaper publishers in proportion to their respective contributions.[17] Based on the testimony concerning administrative costs submitted at the hearing, the Court finds that these fees do not represent an unconstitutional tax on First Amendment activity.

The $50 that the city charges for confiscated newsracks, however, is not written into the ordinance. This failure to include a measurable recovery fee raises a suspicion that this fee raises revenue beyond that necessary to administer the provision. The testimony adduced at the hearing did not alleviate, but rather exacerbated suspi-

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[17] Ordinance No. 2911, § 28-46; Ordinance No. 2984, § 22-161.

cion. *Exito* proved to this court's satisfaction that it could not possibly have cost the city $50 to pick up each newsrack.

The requirement that newsracks carry liability insurance is not unconstitutional. The court finds no evidence of the disparate treatment regarding insurance that troubled the court in *Watts*. In *Watts*, the Eleventh Circuit was concerned where uncontroverted evidence suggested that newsracks at interstate rest areas were being forced to carry liability insurance, while other vending machines, such as Coke or Pepsi, were apparently exempt from such a requirement. *Watts*, 936 F.2d at 1207. Differential treatment for the press of this nature would be presumptively unconstitutional. *Minneapolis Star & Tribune Co. v. Commissioner of Revenue*, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). *Exito* has not shown that newsracks on public rights-of-way must insure against liability, while other vendors are exempted.

Finally, it is unnecessary to reach the issue of whether the color and size of lettering regulations violate *Exito*'s rights under the Lanham Act, 15 U.S.C. § 1051 et seq., as the court has already found those to be invalid time, place or manner regulations.

Accordingly, it is

ADJUDGED that *Exito*'s motion for preliminary injunction is GRANTED IN PART and DENIED IN PART.

1. The term "equivalent" functions as an unconstitutional prior restraint, and the city is enjoined from enforcing that provision in Section 22-164(a) of Ordinance No. 2984. Since the term is severable, the remainder of that section remains in full force and effect.

2. The regulations concerning mounting, installation, placement and maintenance of newsracks are valid place and manner regulations on First Amendment activity, and the city may enforce these restrictions.

3. The regulations concerning color and size of lettering on the sides of newsracks are invalid place or manner regulations, and the city is enjoined from enforcing those portions of Sections 22-164(b) and (c).

4. The regulations concerning fees in Section 22-161 and insurance in Section 22-160 are constitutional, and the city is free to enforce those provisions.

DONE AND ORDERED.

Appendix

CITY OF CORAL GABLES, FLORIDA

ORDINANCE NO. 2911

AN ORDINANCE CONSOLIDATING AND REENACTING ALL PREVIOUS ORDINANCES WHICH AMEND THE "CODE OF THE CITY OF CORAL GABLES" BY ESTABLISHING REGULATIONS FOR NEWSRACKS ON PUBLIC RIGHTS-OF-WAY AND IN PARTICULAR AMENDING CHAPTER 17, ENTITLED "LICENSES", AND CHAPTER 28, ENTITLED "STREETS AND SIDEWALKS", FOR THE PURPOSE OF ADDING PROVISIONS FOR "NEWSRACKS ON PUBLIC RIGHTS-OF-WAY"; ESTABLISHING SPECIAL PROCEDURES CERTIFYING THE INSTALLATION, MAINTENANCE AND INSURING OF NEWSRACKS; RECINDING ORDINANCES NOS.: 2729, 2780, 2865, 2882, 2901 AND 2908; PROVIDING FOR THE SEVERABILITY OF THE PROVISIONS HEREOF; AND REPEALING ALL ORDINANCES INCONSISTENT HEREWITH.

WHEREAS, pursuant to Section 17-30(66)(c)(1)(f) of the "Code of the City of Coral Gables", occupational licensing is required for each newspaper operator and each newspaper vending machine, and

WHEREAS, substantial growth in numbers of newspaper operators and newsracks in the City has produced a significant increase in the number of newsracks installed in public rights-of-way, resulting in complaints by citizens and businesses about certain of these installations, and concern therefor by the public and City officials with regard to the safety, convenience, and aesthetics thereof, and

WHEREAS, the City Commission adopted Ordinance No. 2729 on September 29, 1987 creating Article VI, Section 28-39 thru 28-47 of the "Code of the City of

Coral Gables," which provides regulations pertaining to newsracks on public rights-of-way, and

WHEREAS, the City Commission modified the provisions of Article VI by adopting the following amendatory ordinances: Ordinance No. 2780, Ordinance No. 2865, Ordinance No. 2882, Ordinance No. 2901, and Ordinance No. 2908,

NOW, THEREFORE, BE IT ORDAINED BY THE COMMISSION OF THE CITY OF CORAL GABLES:

SECTION 1. That Section 17-30, of the "Code of the City of Coral Gables", entitled, "Schedule of License Fees", and in particular sub-paragraph (66)(c)(1)(f) thereof, is revised to delete newspaper operators and vending machines from occupational licensing.

SECTION 2. That Chapter 28 of the "Code of the City of Coral Gables", entitled, "Street and Sidewalks", shall be and it is hereby amended by adding thereto the following Article:

ARTICLE VI. NEWSRACKS ON PUBLIC RIGHTS-OF-WAY

Sec. 28-38. Purpose and Criteria. The purpose of the following is to promote the public health, safety and welfare through the regulation of placement, type, appearance, servicing and insuring of newsracks on public rights-of-way so as to: (Ordinance No. 2882, 10 24 89)

(a) Provide for pedestrian and driving safety and convenience;

(b) Restrict unreasonable interference with the flow of pedestrian or vehicular traffic including ingress into or egress from any residence or place of business, or from the street to the sidewalk by persons exiting or entering parked or standing vehicles;

(c) Provide for public and property safety during hurricane conditions;

(d) Provide reasonable access for the use and maintenance of poles, posts, traffic signs or signals, hydrants, mailboxes and access to locations used for public transportation purposes;

(e) Relocate and or replace newsracks which result in a visual blight and or excessive space allocation on the public rights-of-way, or which unreasonably detract from the aesthetics of store window displays, adjacent landscaping and other improvements; as well as to have abandoned newsracks removed (Ordinance No. 2882, 10 24 89);

(f) Maintain and protect the values of surrounding properties;

(g) Reduce unnecessary exposure of the public to personal injury or property damage;

(h) Treat all newspapers equally regardless of their size, content, circulation, or frequency of publication;

(i) Maintain and preserve freedom of the press;

(j) Cooperate to the maximum with newspaper distributors.

Sec. 28-39. Definitions.

(a) "Newsracks" shall mean any type of unmanned device for the vending or free distribution of newspapers or news periodicals.

(b) "Public right-of-way" shall mean any public street, highway, sidewalk, parkway or alley.

Sec. 28-40. Newsrack certificate of compliance. No person shall place, affix, erect, construct or maintain a newsrack without first obtaining a one-time only

certificate of compliance for each newsrack in accord with the provisions of this Ordinance.

Sec. 28-41. Requirements and duties.

(a) *General Placement of newsracks.*

Subject to the prohibitions set forth in subsection (a) of Section 2840 of this chapter, newsracks shall be placed parallel to and no less than eighteen (18) inches nor more than twenty-four (24) inches from the edge of the curb, unless the City determines that placement near a curb is not suitable, in which case the City may authorize placement near the wall of a building. Newsracks placed near the wall of a building must be placed parallel to and not more than six (6) inches from the wall.

(b) *Installation and Maintenance.*

(1) Newsracks shall be single pedestal, TK-80PM or K-80PM SHO-RACK with special pedestal mount and fourteen inch (14") square base plate (mandated), or TK-80 or K-80 SHORACK with special pedestal and 14 inch square base plate (allowed only if demand warrants at the installation location) or equivalent. Under "warranted demand" a Newspaper Publishing Company may include with ordinary demand a reasonable percentage factor to accommodate peak yearly distribution in the quantity of newspapers dispensed, and the City shall not unreasonably withhold approval of such proposal by the Newspaper Publishing Company in accordance with Sec. 28-38 (Ordinance No. 2882, 10 24 89).

(2) Newsracks shall have gloss brown pedestals, gloss beige sides and door, and gloss brown coin box, coated per standard SHO-RACK specifications. The height of the cabinet

top of all newsracks shall be 39 inches above the finished grade level. (Ordinance No. 2865, 9/29/89)

(3) Newsracks shall carry no card holders or advertising except the name of the newspaper being dispensed centered fifteen inches (15") from the top of the cabinet, with duplicate lettering on the front and back of the cabinet, such lettering not exceeding one and three-quarters inches (1¾") in height. (Ordinance No. 2882, 10/24/89)

(4) Newsracks for free newspapers may omit the coin box and may have the pull bar welded to the door to produce an "Honor Rack".

(5) Newsracks shall be maintained in good working order at all times, freshly painted and with unbroken hoods.

(6) The name, address, and telephone number of a responsible person who may be contacted at any time concerning the newsrack shall be displayed on the hood of the newsrack in such a manner as to be readily visible and readable to a prospective customer thereof.

(7) Mounts shall be bolted in place through four standard holes in the base plate in accordance with standards provided in Section 28-47.

Sec. 28-42. Prohibitions.

(a) *Specific.* No newsrack shall be placed, installed, used or maintained:

(1) Within five (5) feet of any marked crosswalk.

(2) Within ten (10) feet of any unmarked crosswalk.

(3) Within ten (10) feet of any fire hydrant, fire call box, police call box or other emergency facility.

(4) Within five (5) feet of any driveway.

(5) Within five (5) feet ahead of, and fifteen (15) feet to the rear of any sign marking a designated bus stop, measured along the edge of pavement.

(6) Within two (2) feet of any bus bench, or plaza bench.

(7) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six (6) feet.

(8) Where a vertically-protruding member of the Newsracks is on or within twelve inches (12″) of any area improved with lawn, or hedges, or within three feet (3′) of flowers or trees. (Ord. No. 2882, 10-24-89)

(9) Within three (3) feet of any display window of any building abutting the sidewalk or parkway or in such a manner as to impede or interfere with the reasonable use of such window display purpose, or within five (5) feet of a building entrance.

(10) Within one hundred fifty (150) feet of another newsrack containing the same newspaper or news periodical except where separated by a street corner. Where warranted by the quantity of newspaper sales, the Public Works Director may allow two newsracks of the same newspaper to be placed side by side.

(11) Facing another newsrack, divided only by the width of a sidewalk or pedestrian walk.

(12) On or within two (2) feet of signs, parking meters, street lights or utility poles.

(b) *General.* The general prohibitions common to all business as specified in Chapter 17 of the Code shall be applicable.

Sec. 28-43. Enforcement Procedures. (Ordinance No. 2882, 10/24/89)

(a) Non conforming newsracks. Within one-hundred fifty (150) days after this ordinance becomes effective and at any time thereafter, any newsrack in violation of any provision of this Chapter shall be subject to remedy and due process under the provisions of Chapter 8B of the Code of the City of Coral Gables, entitled Code Enforcement Board. (Ordinance No. 2908, 4/24/90)

(b) Abandonment. In the event any newsrack installed pursuant to this Chapter does not contain the publications specified therefor within a period of forty-eight (48) hours after release of the current issue, the Code Enforcement Division may deem the newsrack abandoned and take appropriate action under Chapter 8B of the Code. In addition, a newsrack shall be deemed abandoned when no publication is in the newsrack for a period of more than seven (7) consecutive days.

In the event a Newspaper Publishing Company or its Distributor desires to voluntarily abandon a newsrack location, said Distributor shall notify the Public Works Director, completely remove the newsrack and mount, and restore the public right-of-way to a safe condition, leaving no holes or projections in the mounting surface.

Sec. 28-44. Application and issuance of Certificate of Compliance. (Ordinance No. 2901, 2/27/90)

(a) *Issuing authority.* The issuing authority and coordinator shall be the Public Works Director. The Public Works Director is responsible for fairly co-

ordinating and administering the physical placement of newsracks of the type and location herein specified, and upon compliance herewith is responsible for issuing the certificates of compliance. (Ordinance No. 2780, 5/10/88)

(b) *Approving authorities.* The approving authorities shall be the Public Service Director, the Parking Director and the Public Works Director. The Public Service Director shall provide review and approval only as to compliance with Section 28-42(a)(8) herein. The Parking Director shall provide review and approval only as to compliance with Section 28-42(a)(12) herein. The Public Works Director shall provide review and approval coordination with the Public Service Director and the Parking Director, as well as review and approval only as to compliance with Section 28-42(a)(1-7 and 9-11) and other Sections of this Chapter relating to Certificates of Compliance (Ord. No. 2780, 5-10-88).

(c) *Applications.* The applicant shall file with the Public Works Director a written application for an installation certificate of compliance which shall contain the following information:

(1) The name, address and telephone number of the applicant, who is the owner and or principal in responsible charge of the newsrack(s). (Ord. No. 2882, 10-24-89)

(2) The name, address and telephone number of a responsible person whom the City may notify or contact at any time concerning the applicant's newsracks.

(3) The number of newsracks and the proposed location of each shown on a drawing provided by Public Works as in part (d) below.

(4) Names of newspapers or periodicals to be contained in each rack.

(5) Type or brand of newsrack, including an illustration and description of the newsrack and mount if other than a single pedestal, TK-80PM or K-80PM SHORACK with special pedestal mount and fourteen inch (14") square base plate (mandated) or TK-80 or K-80 SHO-RACK with special pedestal mount and four-teen inch (14") square base plate (allowed only if demand warrants at the installation locatin), as per Code of the City of Coral Gables Subsection (b), entitled "Installation and Maintenance", of Sec. 28-41, entitled "Requirements and Duties". (Ord. No. 2882, 10-24-89)

(d) *Procedure.* The Public Works Department shall:

(1) Develop a map which is to a large enough scale to show general citywide locations of newsracks by each publisher or distributor.

(2) Request a list of proposed newsrack locations, marked on the above map, from each distributor.

(3) Prepare a scale drawing or aerial photograph of each newsrack location showing the position and name of each newsrack at that location.

(4) Obtain approvals of the above newsrack drawings from the Parking Director and the Public Service Director.

(5) Obtain confirmation approvals of the above approved newsrack drawings from each distributor.

(6) Have the Public Works Survey Crew, following certificate of compliance issuance, then mark placement locations with a template so that installation crews will have no problem.

(e) *Issuance of certificate of compliance.* Upon a finding by the Public Works Director that the applicant is in compliance with the provisions of this Chapter and having received the required approvals from the Parking Director and the Public Service Director, the Public Works Director shall cause to be issued a certificate of compliance for installation by the newspaper publishing company in accordance with the application and the provisions of this Chapter.

(f) *Denial of certificate of compliance.* If a certificate of compliance for some newsrack location(s) applied for shall be denied, the applicant shall be immediately notified of the specific cause of such denial by the Public Works Director, who will suggest alternative location(s) therefor. The applicant may reapply for substitute alternative location(s) at no additional certificate of compliance fee.

(g) *Additional Newsrack Certificate(s) of Compliance.* If at any time after initial application for an installation Certificate of Compliance a Publisher wishes to install additional newsracks, then the above Procedure and Applications paragraphs are to be repeated in accordance with the provisions of this Chapter. Under Section 28-45 any additional returnable bond deposit required will credit any amount still on account. Additional Certificate(s) of Compliance fee(s) shall be in accordance with Sec. 28-46, except that the $50.00 Publisher's fee is waived if previously paid. (Ord. No. 2882, 10-24-89)

Sec. 28-45. Insurance. Prior to the issuance of a certificate of compliance by the Public Works Director, the applicant shall furnish to the Public Works Director, a certificate of insurance and a one time only returnable bond deposit, both in specific accordance with the terms of Section 28-33 of the Code. Reasonable evidence of equivalent self-insur-

ance coverage may be substituted by the applicant for the above certificate of insurance, subject to the approval of the City Attorney. Insurance under this Section shall run continuously with the presence of the applicant's newsrack(s) in City rights-of-way, and any termination or lapse of such insurance shall be violation of this Chapter, subject to appropriate remedy by the Code Enforcement Division under Chapter 8B of the Code of the City of Coral Gables. (Ord. No. 2882, 10-24-89)

Sec. 28-46. Fees. There shall be a one-time only certificate of compliance fee in the amount of $50.00 (fifty dollars) for each newspaper publisher plus $10.00 (ten dollars) per newsrack. Failed inspections are subject to a reinspection fee of $5 (five dollars). All of the above fees will be used to defray administrative expenses related to this ordinance only, and any revenues over expenses remaining after the implementation of this ordinance will be returned to the newspaper publishers in proportion to their respective contributions.

(a) *Appeals.* Any applicant who has been denied a certificate of compliance pursuant to the provisions of this Chapter may file an appeal with the City Commission by requesting in writing to the City Manager appearance before the Commission in regular session assembled. (Ord. No. 2882, 10-24-89)

Sec. 28-47. Newsrack Mounting Standards.

(1) Foundation four inch (4") minimum concrete, 2500 psi (28 day strength), Class I.

(2) Two inch (2") minimum concrete edge distance for bolts.

(3) One-half inch (½") chamfer all concrete edges.

(4) Three-eights of an inch (⅜″) diameter galvanized lag bolt mounts, three inch (3″) minimum imbedment, through four (4) corners of the pedestal base. (Ord. No. 2882, 10-24-89)

SECTION 3. That the following ordinances shall be and they are hereby rescinded: Ordinance No. 2729, Ordinance No. 2780, Ordinance No. 2865, Ordinance No. 2882, Ordinance No. 2901, and Ordinance No. 2908.

SECTION 4. That if any section, subsection, sentence, clause, phrase, word or amount of this ordinance shall be declared unconstitutional or invalid by competent authority, then the remainder of the ordinance shall not be affected thereby, and shall remain in full force and effect.

SECTION 5. That all ordinances or parts of ordinances inconsistent or in conflict herewith shall be and they are hereby repealed insofar as there is conflict or inconsistency.

PASSED AND ADOPTED THIS FIFTEENTH DAY OF MAY, A.D., 1990

APPROVED:

GEORGE M. CORRIGAN
MAYOR

ATTEST:

VIRGINIA L. PAUL
CITY CLERK

CITY OF CORAL GABLES, FLORIDA

ORDINANCE NO. 2984

AN ORDINANCE AMENDING CHAPTER 22 OF "CODE OF CITY OF CORAL GABLES" ENTITLED "STREETS, SIDEWALKS AND OTHER PUBLIC PLACES" AND IN PARTICULAR ARTICLE VII, "NEWSRACKS ON PUBLIC RIGHTS-OF-WAY" AS IT PERTAINS TO SECTIONS 22-156, 22-159, 22-160, 22-161, 22-162, 22-163, 22-164, 22-165, 22-166; FOR PURPOSE OF MAKING REVISIONS, ADDITIONS AND/OR DELETIONS TO NEWSRACK REGULATIONS; DECLARING EMERGENCY MEASURE FOR PURPOSE OF WAIVING THIRTY-DAY WAITING PERIOD AND PROVIDING EFFECTIVE DATE OF MARCH 31, 1992; AND REPEALING ALL ORDINANCES INCONSISTENT HEREWITH.

WHEREAS, pursuant to Sec. 22-157 of the City Code entitled, "Purpose and Criteria", the City of Coral Gables retained Consultant Legal Counsel in response to a newspaper complaint pertaining to newsrack regulations, and

WHEREAS, Consultant Legal Counsel pursuant to said Sec. 22-157 recommended certain revisions, additions, and/or deletions to the newsrack regulations as hereinafter set forth,

NOW, THEREFORE, BE IT ORDAINED BY THE COMMISSION OF THE CITY OF CORAL GABLES:

SECTION 1. That Chapter 22 of the "Code of the City of Coral Gables" entitled, "Streets, Sidewalks and Other Public Places" shall be and it is hereby amended and in particular Article VII, "Newsracks on Public Rights-of-Way" as it pertains to Sections 22-156, 22-159, 22-160, 22-161, 22-162, 22-163, 22-164, 22-165, 22-166; said amendment for the purpose of making revisions, additions and/or deletions to the newsrack regulations as follows:

CHAPTER 22. STREETS, SIDEWALKS AND OTHER PUBLIC PLACES ARTICLE VII, NEWSRACKS ON PUBLIC RIGHTS-OF-WAY

SEC. 22-156. DEFINITIONS. The following words, terms and phrases, when used in this article, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(a) No change.

(b) No change.

(c) "Equivalent" newsrack means any newsrack which is of the same size, dimensions and style of the specified newsrack.

(d) "If demand warrants"/"warranted demand" means that the measured newspaper stack height needed to meet the newspaper publisher's or distributor's peak annual distribution at the requested newsrack location, as proven by the newspaper publisher or distributor, exceeds fourteen inches (14").

SEC. 22-157. PURPOSE AND CRITERIA. No change.

SEC. 22-158. CERTIFICATE OF COMPLIANCE REQUIRED. No change.

SEC. 22-159. APPLICATION AND ISSUANCE OF CERTIFICATE OF COMPLIANCE.

(a) Issuing Authority. No change.

(b) Approving Authorities. The approving authorities shall be the Public Service Director, the Parking Director and the Public Works Director. The Public Service Director shall provide review and approval only as to compliance with Sec. 22-166(8), Specific Prohibitions. The Parking Director shall provide review and approval only as to compliance with Sec. 22-166(10), Specific Prohibitions. The Public Works Director shall provide review and approval coordination with the Public Service Direc-

tor and the Parking Director, as well as review and approval only as to compliance with Sec. 22-159(c)(e)-(g), Application and Issuance of Certificate of Compliance; Sec. 22-160, Insurance; Sec. 22-161, Fees; Sec. 22-163, Placement Generally; Sec. 22-164, Installation and Maintenance; Sec. 22-165, Newsrack Mounting Standards; Sec. 22-166, Specific Prohibitions (1)(7)(9).

(c) Applications. The applicant shall file with the Public Works Director a written application for an installation certificate of compliance which shall contain the following information:

(1) No change.

(2) No change.

(3) The number of newsracks and the proposed location of each shown on a drawing provided by Public Works as in subsection (d), Procedure below.

(4) Names of newspapers or periodicals to be contained in each newsrack.

(5) Type or brand of newsracks, including an illustration and description of the newsrack and mount if other than a single pedestal TK-80PM or K-80PM SHORACK with special pedestal mount and fourteen inch (14″) square base plate (mandated) or TK-80 or K-80 SHORACK with special pedestal mount and fourteen inch (14″) square base plate (allowed only if demand warrants at the installation location), or a newsrack manufactured with modifications to the door, window and cabinetry of the above-described newsracks to accommodate vertically-formatted ("Tabloid-type") newspaper display and distribution, as per Sec. 22-164, Installation and Maintenance.

(d) Procedure. No change.

(e) Issuance of Certificate of Compliance. Upon a finding by the Public Works Director that the applicant

is in compliance with the provisions of this article and having received the required approvals from the Parking Director and Public Service Director, the Public Works Director shall cause to be issued a certificate of compliance for installation by the newspaper publishing company. Such issuance shall be made within five (5) working days of the City's receipt of the completed application.

(f) Denial of Certificate of Compliance. If a certificate of compliance for some newsrack location applied for shall be denied, the applicant shall be notified within five (5) working days of the City's receipt of the completed application. The applicant shall be advised of the specific cause of such denial by the Public Works Director, who will suggest alternative locations therefor. The applicant may reapply for substitute alternative location at no additional certificate of compliance fee.

(g) Additional Certificate of Compilance. If at any time after initial application for an installation certificate of compliance a publisher wishes to install additional newsracks, then subsections (c), Applications, and (d), Procedure, above are to be repeated in accordance with the provisions of this article. Under Sec. 22-160, Insurance, any additional returnable bond deposit required will credit any amount still on account. Additional certificate of compliance fees shall be in accordance with Sec. 22-161, Fees, except that the $50.00 publisher's fee is waived if previously paid.

SEC. 22-160. INSURANCE.

(a) Prior to the issuance of a certificate of compliance by the Public Works Director, the applicant shall furnish to the Public Works Director a certificate of insurance and a one-time only returnable bond deposit, both in specific accordance with the terms of Sec. 22-113, except that returnable bonding amounts for newsrack installations shall be:

Total Proposed Newsracks	Total Returnable Bond
1 to 4	$150
5 to 10	$300
11 to 20	$500
21 and up	$700

(b) Reasonable evidence of equivalent self-insurance coverage may be substituted by the applicant for the above certificate of insurance. Insurance under this section shall run continuously with the presence of the applicant's newsrack in City rights-of-way, and any termination or lapse of such insurance shall be a violation of this article, subject to appropriate remedy by the Code Enforcement Division under Sec. 2-61 et seq. of this Code.

SEC. 22-161. FEES. There shall be a one-time only certificate of compliance fee in the amount of fifty dollars ($50.00) for each newspaper publisher plus ten dollars ($10.00) per newsrack. Failed inspections are subject to a reinspection fee of five dollars ($5.00). All of the above fees will be used to defray administrative expenses relating to this article only, and any revenues over expenses remaining after the implementation of this article will be returned to the newspaper publishers in proportion to their respective contributions.

SEC. 22-162. APPEALS. Any applicant who has been denied a certificate of compliance pursuant to the provisions of this article may file an appeal with the City Commission by requesting in writing to the City Manager appearance before the Commisison to review said denial. The appeal shall be heard by the Commission within thirty (30) days of the filing of the appeal or at the next regularly scheduled agenda. whichever is sooner. The decision of the Commission on appeal is subject to judicial review as provided by the laws of the State of Florida.

SEC. 22-163. PLACEMENT GENERALLY. Subject to the probitions set forth in Sec. 22-166, Specific

Prohibitions, newsracks shall be placed parallel to and not less than eighteen inches (18″) nor more than twenty-four inches (24″) from the edge of the curb. Newsracks placed near the wall of a building must be placed parallel to and not more than six inches (6″) from the wall.

SEC. 22-164. INSTALLATION AND MAINTENANCE

(a) Newsracks shall be single pedestal TK-80PM or K-80PM SHORACK with special pedestal mount and fourteen inch (14″) square base plate (mandated) or TK-80 or K-80 SHORACK with special pedestal and fourteen inch (14″) sqaure base plate (allowed only if demand warrants at the installation location) or equivalent. Manufactured modifications to the door, window, and cabinetry for the above-described newsracks to accommodate vertically formatted, "tabloid-type" newspaper display and distribution are acceptable.

(b) Newsracks shall have gloss brown pedestals, gloss beige sides and door and gloss brown coin box. The height of the cabinet top of all newsracks shall be thirty-nine inches (39″) above the finished grade level.

(c) Newsracks shall carry no card holders or advertising except the name of the newspaper being dispensed centered fifteen inches (15″) from the top of the cabinet with duplicate lettering on the front, sides and back of the cabinet, such lettering not exeeding one and three-quarters inches (1¾″) in height. The above fifteen inch (15″) dimension may be adjusted on the door by the manufacturer to accommodate modifications for vertically-formatted "tabloid-type" newsracks.

(d) No change.

(e) No change.

(f) Mounts shall be bolted in place through four (4) standard holes in the base plate in accordance with stand-

ards provided in Sec. 22-165, Newsrack Mounting Standards. Newsrack cabinet tops shall be installed and checked for level; a water-soluble, paintable, 10-year caulk of gloss brown color, matching the base plate, shall be applied and wiped to seal around the base plate and the mounting surface.

(g) Changed to (f) above.

SEC. 22-165. NEWSRACK MOUNTING STANDARDS. The following standards shall be applicable to the mounting of newsracks in this City:

(1) No change.

(2) No change.

(3) No change.

(4) Three-eights inch (3/8″) diameter hot-dipped galvanized hex bolt mounts, three-inch (3″) minimum imbedment, threads down, through four (4) corners of the pedestal base.

SEC. 22-166. SPECIFIC PROHIBITIONS. No newsrack shall be placed, installed, used or maintained: (Specific prohibitions were formerly referred to as subsection (a))

(1) Within five feet (5′) of any marked crosswalk.

(2) Within ten feet (10′) of any unmarked crosswalk.

(3) Within ten feet (10′) of any fire hydrant, fire call box, police call box or other emergency facility.

(4) Within five feet (5′) of any driveway.

(5) Within five feet (5′) ahead of, and fifteen feet (15′) to the rear of any sign marking a designated bus stop, measured along the edge of pavement.

(6) Within two feet (2′) of any bus bench, or plaza bench.

(7) At any location whereby the clear space for passageway of pedestrians is reduced to less than six feet (6′).

(8) Where a vertically protruding member of the newsracks is on or within twelve inches(12″) of any area improved with lawn or hedges or within three feet (3′) of flowers or trees.

(9) Within three feet (3′) of any display window of any building abutting the sidewalk or parkway or in such a manner as to impede or interfere with the reasonable use of such window display purpose, or within five feet (5′) of a building entrance.

(10) Deleted.

(11) Deleted.

(10) On or within two feet (2′) of signs, parking meters, street lights or utility poles.

(12) Changed to (10) above.

(b) Deleted. (General prohibition provision)

SEC. 22-167. ENFORCEMENT PROCEDURES—NON-CONFORMING NEWSRACKS. No change.

SEC. 22-168. ENFORCEMENT PROCEDURES—ABANDONED NEWSRACKS. No change.

SECTION 2: That this ordinance is hereby declared to be an emergency measure for the purpose of waiving thirty-day waiting period, providing an effective date of March 31, 1992.

SECTION 3: That all ordinances or parts of ordinances inconsistent or in conflict herewith shall be and they are hereby repealed insofar as there is conflict or inconsistency.

PASSED AND ADOPTED THIS THIRTY-FIRST DAY OF MARCH, A.D., 1992.

APPROVED:

GEORGE M. CORRIGAN
MAYOR

ATTEST:

VIRGINIA L. PAUL
CITY CLERK
B H(5); B/H(5)

APPENDIX C

[Filed Mar. 29, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4764

GOLD COAST PUBLICATIONS INCORPORATED,
a Delaware Corporation dba EXITO,
Plaintiff-Appellee,
Cross-Appellant,

NEW TIMES NEWSPAPER OF FLORIDA,
Intervenor-Plaintiff,

versus

GEORGE M. CORRIGAN, individually as the
Mayor of the City of Coral Gables,

JAMES BARKER, individually as Vice Mayor
of the City of Coral Gables,

WILLIAM H. KERDYK, individually as
City Commissioner of the City of Coral Gables,

BOB HILDRETH, individually as City Commissioner
of the City of Gables,

WAYNE CHIP WITHERS, individually as
City Commissioners of the City of Coral Gables,

CITY CORAL GABLES, a municipal corporation
and political subdivision of the State of Florida,

ALAN L. RICHMAN, as Code Enforcement Officer
of the City of Coral Gables,

CORAL GABLES CITY COMMISSION,
the governing body of the City of Coral Gables,
Defendants-Appellants
Cross-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) FOR REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge and RONEY, Senior Circuit Judge.

PER CURIAM:

(✔) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s Gerald B. Tjoflat
Chief Judge

Supreme Court, U.S.
FILED
SEP 26 1995
CLERK

No. 95-160

In the Supreme Court of the United States

OCTOBER TERM, 1995

GOLD COAST PUBLICATIONS, INC. AND
NEW TIMES, INC.,
Petitioners

v.

THE CITY OF CORAL GABLES

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), requires remand of this case for reconsideration of whether the uniform color and lettering size provisions in the City of Coral Gables' ordinance regulating newspaper vending machines violate petitioners' First Amendment rights.

PARTIES

Petitioners are listed on page ii of the petition. Petitioners' list of respondents is incorrect. Pet. ii. The following persons were originally named as defendants in petitioner Gold Coast Publications, Inc.'s complaint, but they were dismissed by the district court and were not parties in the court of appeals: George M. Corrigan, Mayor of Coral Gables; James Barker, Vice Mayor; William H. Kerdyk, Bob Hildreth, and Wayne "Chip" Withers, City Commissioners; the Coral Gables City Commission; and Alan L. Richman, the Code Enforcement Officer. *See* Pet. App. 7a n.7. Accordingly, under this Court's Rule 12.4, the City of Coral Gables is the only proper respondent in this Court. The caption on this brief has been corrected to reflect this fact.

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STATUTES

Code of the City of Coral Gables, Florida, § 22-164 2

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-160

GOLD COAST PUBLICATIONS, INC. AND
NEW TIMES, INC.,
Petitioners

v.

THE CITY OF CORAL GABLES

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent the City of Coral Gables, by its undersigned counsel, submits this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

This case arose from the violation by petitioner Gold Coast Publications, Inc. ("Gold Coast") of an ordinance regulating newspaper vending machines ("newsracks") on public rights of way in the City of Coral Gables, Florida ("the City"). The City adopted the newsrack ordinance ("the Ordinance") to regulate the growing number of newsracks in the City and continue its efforts to promote

aesthetics in planning and development. Before adopting the Ordinance, the City created a task force to study methods of improving the City's appearance, including the regulation of newsracks on public streets and sidewalks. After studying the issue, the task force developed a proposed ordinance to regulate newsracks and revised it several times in accordance with input from newspaper publishers and public hearings. The most recently revised version of the Ordinance (Ordinance No. 2911, adopted May 15, 1990, as amended by Ordinance No. 2984, adopted March 31, 1992) is at issue in this case. The Ordinance applies equally to all newsracks on city streets and requires, among other things, uniform design, size, and color of newsracks. Pet. App. 55a-75a.

Although petitioners at one time challenged numerous portions of the Ordinance, the only section that remains at issue is § 22-164 (Pet. 2), which regulates the color of newsracks as well as the size of the lettering on the outside of each newsrack that identifies the newspaper contained therein. In an attempt to preserve the traditional Mediterranean appearance of the City, the Ordinance requires that all newsracks on public streets and sidewalks be beige and brown in color and that the newspaper's name on each newsrack be printed in letters no more than an inch and three-quarters in height. These requirements apply equally to all newsracks on public streets and sidewalks in the City. They, of course, impose no restriction whatever on the content of the newspapers being distributed through newsracks.

Gold Coast is a newspaper publisher that publishes *Exito*, a weekly Spanish-language newspaper distributed in the City. The newsracks distributing *Exito* were painted deep purple and prominently displayed the *Exito* logo in lime green, bright orange, or hot pink. The *Exito* newsracks thus clearly violated the Ordinance's regulations regarding color and lettering size.

Finding that the newsracks containing *Exito* were not in compliance with the Ordinance, the City notified petitioner Gold Coast on November 26, 1991, that the newsracks needed to be brought into compliance within thirty days or the City would remove them. Despite the City's fifteen-day extension of the deadline for compliance, Gold Coast did not bring its newsracks into compliance with the Ordinance, and six newsracks were removed by the City on January 17, 1992.[1]

In response to the City's removal of its newsracks, Gold Coast brought this action against the City and a number of its officials seeking, *inter alia*, injunctive relief against enforcement of the Ordinance. Petitioner New Times, Inc., which already was challenging the constitutionality of the Ordinance in a pending state court action, intervened as an additional plaintiff.[2] Gold Coast's amended complaint contained eleven counts alleging, on the basis of various theories, that Gold Coast's constitutional rights were violated by nine separate sections of the Ordinance. All of these arguments, save the one about color and size of lettering, have now been abandoned.

The district court rejected most of Gold Coast's arguments and sustained the validity of all but two of the Ordinance's provisions. The two exceptions were the provision regarding color and lettering size that petitioners challenge here and another provision that requires newsracks to be of a particular make and model or its "equivalent." Pet. App. 37a, 51a. With respect to the provision governing color and the size of lettering, the court held that it is not narrowly tailored to advance the City's legitimate interest in aesthetics and therefore is unconstitu-

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[1] The City informed Gold Coast that the newsracks would be returned upon payment of $50 per newsrack.

[2] Contrary to petitioners' statement, New Times, Inc.'s publication, *New Times*, is not "the only general circulation English-language alternative to the Miami Herald in the Miami metropolitan area." *See* Pet. 2.

tional. Pet. App. 50a. With respect to the provision governing the make and model of newsracks, the court ruled that the use of the term "equivalent" leaves too much discretion in the hands of city officials evaluating a newsrack's compliance with the Ordinance and that the provision therefore is invalid. Pet. App. 40a. The court enjoined the City from enforcing these two provisions of the Ordinance, and left the remainder of the Ordinance intact.

Petitioners and the City both appealed. The court of appeals upheld the Ordinance in its entirety. The court affirmed without difficulty the district court's rejection of the vast majority of petitioners' claims. Pet. App. 26a. The court also reversed the district court's grant of injunctive relief as to the provisions regarding color, lettering size, and the use of "equivalent" newsracks. Pet. App. 25a. The court concluded that the color and lettering size provisions are narrowly tailored to advance the City's aesthetic goals, and it explicitly rejected the district court's holding to the contrary. The court also stated that the discretion allowed by the use of the term "equivalent" is limited "through neutral criteria and procedural safeguards set forth in the text of the Ordinance," thus distinguishing the Ordinance from the regulation rejected in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Pet. App. 24a.

ARGUMENT

The court of appeals' decision is correct, and further review is not warranted. Petitioners seek a remand in purported reliance on the reasoning of *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995), but that decision is irrelevant to this case and does nothing to undermine the decision of the court of appeals. *Coors* is easily distinguishable because that case involved a restriction on the content of speech. In contrast, the Ordinance at issue in this case does nothing to restrict petitioners' right to free speech or expression; it only regulates the physical appearance of newsracks.

Although the court of appeals' opinion makes clear that the Ordinance does not violate the First Amendment under either commercial or noncommercial speech standards (Pet. App. 1a-26a), there is no need for an extended First Amendment discussion in this case. Understandably, the court of appeals addressed each of petitioners' arguments, but the issue here is not as complicated as petitioners have sought to make it. The disputed provision of the Ordinance does not affect petitioners' First Amendment rights in any way. Neither petitioners' expression of their views nor their ability to distribute through newsracks is restricted. The disputed provision is a content-neutral regulation of the color and lettering of newsracks, and the City was well within its authority to adopt it.

I. THE FIRST AMENDMENT DOES NOT CREATE A RIGHT TO HAVE NEWSPAPER VENDING MACHINES OF SPECIFIC COLOR AND LETTERING SIZE

The First Amendment's free speech guarantee protects the expression of ideas, not the color of newsracks. Petitioners contend that the color of newsracks and the size of lettering on newsracks are protected by the First Amendment as commercial speech. The characterization of newsrack color and lettering size as commercial speech is critical to petitioners' position because *Rubin v. Coors*

Brewing Co., 115 S. Ct. 1585 (1995), is premised on the regulation of commercial speech. But the Ordinance does not affect petitioners' right to free speech in any way. The Ordinance does not regulate the content of petitioners' newspapers, it does not prohibit petitioners from distributing their newspapers through newsracks, and it does not discriminate against particular newspapers or kinds of newspapers in favor of others. The disputed section of the Ordinance merely contains a reasonable restriction on the color of newsracks and the size of lettering that may appear on them.

This Court has never suggested that a city may not regulate the color of newsracks or the lettering size on newsracks. On two occasions, this Court has invalidated regulations applying to newsracks, but the regulations at issue in those cases were far different from the Ordinance at issue here. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). In *Discovery Network*, the Court invalidated a regulation that discriminated between newsracks containing commercial handbills and newsracks containing newspapers. 113 S. Ct. at 1516-17. The discrimination was based on the content of the materials being distributed. *Id.* In *City of Lakewood*, the Court held that the regulation created the possibility of content-based discrimination because it gave the mayor unlimited discretion in granting exceptions to the City's general prohibition of newsracks on public sidewalks. 486 U.S. at 772. The Ordinance here presents neither of these problems nor any other restrictions or potential restrictions of expression. As the court of appeals correctly held, the Ordinance does not suffer from the problems identified in *Discovery Network* and *City of Lakewood* because it is not content-based and does not allow city officials excessive discretion in applying its provisions. Pet. App. 13a-14a, 24a. In the absence of any provision that even arguably restricts expression, no First Amendment concern is presented.

It is well-settled that a state or local government, "no less than a private owner of property, has power to preserve the property under its control for the use of which it is lawfully dedicated." *Adderley v. Florida*, 385 U.S. 39, 47 (1966). Further, this Court has consistently acknowledged that state and local governments may legitimately exercise their police powers to preserve or improve their aesthetic environments. *See, e.g., Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (referring with approval to content-neutral regulation of billboards based on aesthetic interests); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding prohibition of signs posted on public property); *Berman v. Parker*, 348 U.S. 26 (1954) (confirming the power of a legislature to remove blighted housing). A majority of the Court in *Metromedia* acknowledged that a city's interest in limiting visual clutter would justify a content-neutral regulation of billboards. 453 U.S. at 507-508 (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting). Similarly, in *Taxpayers for Vincent*, the Court held that a prohibition on the posting of signs on public property was constitutional and recognized that a city "may legitimately exercise its police powers to advance aesthetic values." 466 U.S. at 805.

This Court's decisions thus clearly support a city's authority to adopt a content-neutral regulation that advances the city's aesthetic goals and does nothing to abridge expression. Such a regulation, like the one at issue here, does not implicate any of the interests protected by the First Amendment. Indeed, both the Court's opinion in *City of Lakewood* and the dissent in that case make clear that a city may adopt content-neutral regulations governing newsracks. 486 U.S. at 760, 773. In the dissent's words, "[i]t is only common sense that cities be allowed to exert some control over those who would permanently appropriate city property for the purpose of erecting a newspaper dispensing device." *Id.* at 773 (White, J., dissenting).

In fact, the Court's various opinions in *Discovery Network* and *City of Lakewood* strongly suggest that a complete ban on newsracks would be permissible. Several Justices in *City of Lakewood* explicitly stated that cities could prohibit newsracks altogether because "[t]here is no constitutional right to place newsracks on the city sidewalks over the objections of the city." 486 U.S. at 784. The majority did not disagree, basing its ruling on the more limited rationale that the regulation at issue allowed the mayor too much discretion in granting newsrack permits. *Id.* at 772. Similarly, in *Discovery Network*, several Justices stated, without disagreement by the majority, that a total ban on newsracks would be constitutional: "In my view, the city may order the removal of *all* newsracks from its public right-of-ways if it so chooses." 113 S. Ct. at 1525 (Rehnquist, C.J., dissenting) (citing dissent in *City of Lakewood*). Particularly under these circumstances, an aesthetic regulation that does not discriminate on the basis of content does not violate the First Amendment.

II. THE DECISION IN *COORS* IS NOT RELEVANT TO THIS CASE

Rubin v. Coors Brewing Co., 115 S. Ct. 1585 (1995), is irrelevant to the present case. The irrelevancy of *Coors* is clear not only because the regulations at issue here do not restrict petitioners' right to expression in any way, but also because, as the court of appeals recognized, the regulations are constitutional even when examined under the strictest First Amendment standards. *See* Pet. App. 14a-19a. The court of appeals' holding that the Ordinance survives even when tested against the strict standards governing regulation of noncommercial speech—a holding that petitioners do not challenge or even discuss—shows that *Coors*, a decision based on less demanding commercial speech standards, has no bearing on the present case. In fact, petitioners' arguments to the court of appeals did not even raise the issue of whether the Ordinance validly

restricts commercial speech; petitioners focused exclusively on challenging the regulations as restrictions on noncommercial speech, and their arguments were explicitly rejected by the court. The court undertook the commercial speech inquiry *sua sponte* and ruled that the Ordinance is valid whether measured against commercial or noncommercial speech standards, or both. Pet. App. 25a. Petitioners now challenge only the court's holding regarding commercial speech and ignore the fact that the court held that the regulations are valid even if viewed as restrictions on noncommercial speech, the kind of speech that is afforded the greatest First Amendment protection.

Petitioners' argument is predicated on the unstated but erroneous assumption that a regulation that satisfies the more stringent First Amendment standard, and qualifies as a reasonable "time, place, and manner" restriction on noncommercial speech, can nevertheless be held unconstitutional as an excessive restriction of commercial speech. Contrary to petitioners' suggestion, the court of appeals did not recognize or approve such a proposition. *See* Pet. 6 n.2. More important, this Court has never done so. In fact, this Court has recently reaffirmed that " 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression.' " *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989) (citation omitted), *quoted with approval in Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2375 (1995). The court of appeals explicitly recognized this fact and prefaced its commercial speech discussion by stating that "the First Amendment offers less protection to commercial speech than to noncommercial speech." Pet. App. 20a (citing *Metromedia*, 453 U.S. at 505-06). It follows *a fortiori* that regulations that are found to be valid restrictions on noncommercial speech cannot be challenged as unconstitutional restrictions on commercial speech.

In any event, even if this Court were to review the Ordinance under the commercial speech standards applied in *Coors* and earlier cases, the Ordinance would pose no constitutional problem. The regulation at issue here is readily distinguishable from the statutory provision in *Coors*. That provision, § 5(e)(2) of the Federal Alcohol Administration Act of 1935, prohibited beer labels from disclosing alcohol content. The regulation thus restricted the content of speech. In contrast, the regulation being challenged here is content-neutral and is completely unrelated to speech or the content of petitioners' newspapers.

Because the regulation in *Coors* restricted the content of beer manufacturers' expression, the Court held that it was an unconstitutional restriction on commercial speech. 115 S. Ct. at 1594. By contrast, the City's Ordinance only regulates the physical appearance of newsracks. It does not restrict expression in any way. Despite petitioners' claims, the color of their newsracks and the height of the lettering on newsracks do not qualify as expression warranting First Amendment protection.

Coors is further distinguishable because the Ordinance at issue here does not contain the kind of internal inconsistencies that contributed to the Court's decision invalidating the statutory prohibition against disclosing alcohol content on beer labels. The government argued that the ban against such disclosure helped prevent "strength wars" among beer manufacturers, but other provisions of the statute directly undermined this goal by allowing, and sometimes requiring, other methods of disclosing alcohol content. 115 S. Ct. at 1592. The Court reasoned that these internal inconsistencies prevented the advancement of the government's interest, undermined the government's justification for the restriction, and thus supported the conclusion that the challenged statute violated the manufacturer's free speech rights. *Id.* at 1592-94. The Ordinance at issue here does not contain any such inconsistencies.

The Ordinance's "partial solution" to the City's aesthetic concerns applies to all newsracks on city streets and is neither irrational nor inconsistent with the City's aesthetic goals. Unlike the regulation in *Coors*, the Ordinance clearly advances the City's legitimate interests.

Contrary to petitioners' assertions, *Coors* did not hold that partial measures addressing aesthetic concerns violate the First Amendment. *See* Pet. 8-10. *Coors* does not require that cities regulate every object on their streets in order to regulate one particular class of objects. If that were the case, cities would soon be paralyzed by the burden of being required to adopt comprehensive regulations for every problem facing them. In fact, this Court has approved partial solutions to a city's aesthetic concerns. *Taxpayers for Vincent*, 466 U.S. at 811; *Metromedia*, 453 U.S. at 511-12. In both *Taxpayers for Vincent* and *Metromedia*, the Court stated that partial, content-neutral regulations, such as the one at issue in this case, can advance a city's legitimate interest in aesthetics. *Id.* Moreover, this Court has stated in other contexts that a legislature is free to proceed in a stepwise manner, to address one or more aspects of a problem at a time, without jeopardizing the validity of a regulatory action. *See, e.g., Posada De Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986) (rejecting "underinclusive" argument and upholding a partial restriction on gambling advertising that advanced the legislature's interests). The Ordinance at issue here rationally advances the aesthetic interests of the City and does not affect, much less violate, petitioners' First Amendment rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 95-160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GOLD COAST PUBLICATIONS, INC. and
NEW TIMES, INC.,
Petitioners,
v.
GEORGE M. CORRIGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

In their petition, petitioners showed that *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995), is incompatible with the reasoning of the opinion below, and that the court of appeals should now have an opportunity to reconsider its decision with *Coors* in mind. Respondents—apart from their patently false contention that the *Coors* decision turned on issues of content neutrality, see Opp. 10—make no serious effort to reconcile *Coors* with the opinion below. Instead, they argue that the *outcome* below was correct for a variety of reasons that the court of appeals itself did not accept. Those arguments, quite apart from their substantive implausibility, are properly addressed to the court of appeals on remand. They are not a basis for denying a remand and forever barring substantive review of petitioners' First Amendment challenge in light of *Coors*.

1. As their primary argument for denying a remand to the court of appeals, respondents contend that this case raises no First Amendment issues of any kind because, in their view, the City's newsrack ordinance "does nothing to restrict petitioners' right to free speech or expression[.]" Opp. 5. That position is substantively untenable and, in any event, presents no basis for denying a remand in light of *Coors*.

First, respondents' position was not the basis for the decision below. Indeed, the court of appeals correctly repudiated that position by acknowledging that a newsrack's appearance is entitled to a measure of First Amendment protection, see Pet. App. 11a, and by subjecting respondents' newsrack ordinance to a comprehensive First Amendment analysis. In short, respondents' position on the First Amendment's applicability to this case is not an argument about the probability that the court of appeals would reconsider its opinion in light of *Coors* —the appropriate standard for determining whether this Court should vacate a decision and remand in light of intervening precedent. Instead, it is an argument, and a flawed one at that, about the ultimate merits of this case. That argument is properly addressed to the court of appeals (which has already rejected it), not to this Court as a means of foreclosing further review.

Second, respondents' position—that the First Amendment has no bearing on newsrack regulations—is substantively wrong. The stylistic form through which publishers present their newspapers to the public is a mode of expression protected by the First Amendment, and respondents cite no case to the contrary. Surely the First Amendment would have some bearing on (for example) a law that required all newspapers to look like the Wall Street Journal or the National Enquirer. See *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 602-03 (1953) (First Amendment protects "dissemination of news from as many different sources, and with as many different facets and colors as is pos-

sible") (internal quotations omitted); see also *Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2046 (1994) (First Amendment protects speaker's right to choose manner of presenting message as well as content of message itself); *Texas* v. *Johnson*, 491 U.S. 397, 404-05 (1989) (surveying wide range of expressive activity entitled to First Amendment protection). Whether or not such a law would ultimately be upheld—and it likely would not—the First Amendment would unquestionably guide the analysis.

Similarly, the First Amendment protects a newspaper publisher's right to advertise its newspapers in a form that appeals to, and is easily recognized by, its distinctive readership. See generally Pet. App. 11a ("[i]t is well settled that the right to distribute newspapers through newsracks is protected under the First Amendment") (citing *Miami Herald Publishing Co.* v. *Hallandale*, 734 F.2d 666, 673-74 (11th Cir. 1984)). As the district court found, see Pet. App. 29a, 51a, the flamboyantly cursive script of the *Exito* logo and the bold colors of the *Exito* newsracks conveyed to potential readers a powerful message about the newspaper's style and content, *cf. Qualitex Co.* v. *Jacobson Prods. Co.*, 115 S. Ct. 1300, 1304-05 (1995), a message that Coral Gables' newsrack ordinance suppresses altogether. As the court of appeals recognized, the validity of that ordinance is properly viewed through the prism of the First Amendment.

At bottom, respondents appear to contend that a city may insulate restrictions on journalistic expression from First Amendment scrutiny simply by characterizing them as "content neutral." See Opp. 6 (confounding issue of whether speech restriction is "content-based" with issue of whether a "First Amendment concern is presented").[1]

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[1] Moreover, it is highly questionable whether the newsrack ordinance is indeed content neutral. As the district court observed, requiring stylistic uniformity among all newsracks disproportionately harms alternative newspapers like those published by petitioners—indeed, it renders them "invisible." Pet. App. 50a-51a. Such laws, designed to muffle alternative voices with arbitrary

But that is not the law. As demonstrated by the very criteria employed under both the traditional time, place and manner analysis, see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and the *Central Hudson* test for restrictions on commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), a speech restriction can be both content neutral and inconsistent with the First Amendment.

2. Respondents also argue that *Coors*, a "mere" commercial speech case, can have no effect on the proper outcome here because, in addition to its commercial speech analysis, the court of appeals also found the newsrack ordinance unobjectionable under the traditional time, place and manner test. This latter test, respondents contend, is in all contexts more stringent than any commercial speech analysis.

This argument is flawed for several reasons. First, and most important, it is an argument that the court of appeals tacitly rejected. The court of appeals based its opinion on the premise that the newsrack ordinance would be unconstitutional if it violated *either* the time, place and manner test *or* the *Central Hudson* analysis for restrictions on commercial speech. See Pet. App. 12a. If the court had believed that the result under the commercial speech analysis followed *a fortiori* from the result under the traditional time, place and manner analysis, it would have said so, and it would not have engaged in a lengthy application of commercial speech principles to the facts of this case. Because the court of appeals attributed a dispositive and independent significance to the commercial speech aspect of this case, it should now have the opportunity to reconsider both its reasoning and

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demands of stylistic conformity, pose a special threat to the First Amendment's protection of journalistic heterogeneity. *See, e.g., Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 602-03 (1953).

its decision in light of *Coors*, which is squarely inconsistent with the court's existing opinion.

On the merits, respondents cite no authority for the novel proposition that commercial speech analysis is necessarily superfluous where a content-neutral speech restriction would survive mid-tier scrutiny under the traditional time, place and manner criteria. Again, simply by conducting a full scale inquiry under both lines of First Amendment analysis, the court of appeals effectively rejected respondents' position on this issue and foreclosed the very basis on which they now seek to avoid a remand.

Finally, and in any event, the *Coors* decision casts doubt on *both* the court of appeals' commercial speech analysis *and* its traditional time, place and manner analysis. In *Coors*, this Court confirmed that, despite ambiguous prior precedent (see Pet. 9), "the overall irrationality of . . . [a] regulatory scheme" bars any finding under *Central Hudson* that the scheme "directly advances" a legitimate governmental interest. *Coors*, 115 S. Ct. at 1592. From this it follows that the "overall irrationality of a regulatory scheme" can also show, for purposes of the traditional time, place and manner test, that a speech restriction is not "narrowly tailored to serve a significant government interest." *Perry*, 460 U.S. at 46; see generally *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989) (noting " 'substantial[] similar[ity]' " between *Central Hudson* test and time, place and manner analysis). That is particularly true if (as respondents contend) traditional First Amendment analysis necessarily affords more protection than commercial speech analysis. In short, the *Coors* decision challenges the conceptual underpinnings of the decision below, and both the court of appeals and the parties should have an opportunity to address its effect on this case.

3. Respondents seek to distinguish *Coors* on the ground that it, unlike this case, involved a content-discriminatory speech restriction. See Opp. 10. Yet the

issue of content neutrality is not even a component of commercial speech analysis, see *Central Hudson*, 447 U.S. at 566, and it had nothing to do with the *Coors* decision. In *Coors*, this Court struck down a federal alcohol labeling restriction *not* because it was content-based, but because the government's overall inconsistency in pursuing the restriction's ostensible objective "ensures that the labeling ban will fail to achieve" that objective. *Coors*, 115 S. Ct. at 1593. As discussed in our petition (at pp. 8-10), the same kind of pervasive inconsistency undermines Coral Gables' purported justification—the City's widely unenforced Mediterranean "theme"—for its newsrack ordinance.

Respondents seek to distinguish *Coors* on the additional ground that the federal government pursued the regulatory objective at issue in that case (*i.e.*, preventing alcohol-content "strength wars") more inconsistently than Coral Gables has pursued its half-hearted Mediterranean theme in this case. Opp. 10-11.[2] Simply as a factual matter, this claim is untrue. The record confirms, and respondents do not deny, that Coral Gables permits trash

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[2] Like the court of appeals, *see* Pet. App. 21a, respondents rely on pre-*Coors* decisions of this Court holding that, in certain specific contexts, the state may have legitimate reasons for non-uniform enforcement of the aesthetic objectives it invokes to justify restrictions on commercial speech. *See Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810-12 (1984) ("[t]he private citizen's interest in controlling the use of his own property" justifies banning certain signs on public property but not on private property); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion) (city had "reasonabl[e]" basis for banning "offsite" advertising on city streets but not "onsite" advertising). Here, the City has offered no legitimate reason for permitting innumerable objects on its public streets and sidewalks to clash with its supposed aesthetic theme. More fundamentally, as discussed in our petition (at p. 9), the *Coors* decision sharply limits the *Taxpayers/Metromedia* principle upon which both respondents and the court below have relied—and, indeed, renders it inapplicable here. For that reason alone, the court of appeals should have an opportunity to reconsider its decision in light of *Coors*.

receptacles, awnings, and other objects throughout the City to clash with its supposed aesthetic "theme." Pet. App. 50a. In any event, respondents argue, at bottom, that the *Coors* decision is different in degree, not that it is different in kind. That, of course, is precisely the sort of argument that should be presented to the court of appeals in the first instance, not to this Court as a means of cutting off further consideration of this case in light of intervening precedent.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below should be vacated, and the case should be remanded to the Eleventh Circuit for further proceedings in light of *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

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